

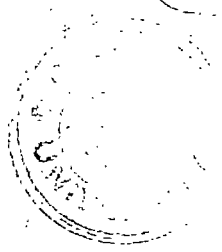
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THE TWENTIETH YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE *

BY MANLEY O. HUDSON

The Permanent Court of International Justice was not active during its twentieth year. The institutional framework of the Court was maintained, the personnel of its bench was kept intact, its officials were at their posts, and certain funds were available for current expenses; but no sessions were held during the year, and no progress was made with the two pending cases. Nor were there any significant developments during the year with reference to the international instruments relating to the Court, the attention of Governments being completely engrossed in other fields.

Under Article 23 of its revised Statute, the Court is "permanently in session except during the judicial vacations." In 1940, it held a series of meetings at The Hague from February 19 to February 26, but a meeting planned for the month of May could not be held. Since that time no attempt has been made to assemble the judges, most of whom are in their own countries.

Two cases are still pending before the Court. In the case relating to the Electricity Company of Sofia and Bulgaria, begun by the Belgian application filed with the Registry on January 26, 1938, the Court gave a judgment on a preliminary objection advanced by Bulgaria, on April 4, 1939,¹ and on December 5, 1939, it gave an order indicating interim measures of protection;² by an order of February 26, 1940, it fixed May 16, 1940, as the date for the commencement of the oral proceedings in the case,³ but events necessitated an indefinite postponement and no further action has been taken by either of the parties. In the *Gerliczy Case*, a proceeding instituted against Hungary by the Principality of Liechtenstein by an application filed with the Registry on June 17, 1939, time-limits were fixed for the filing of the documents of the written procedure, but the applicant's memorial has not been filed, and no further step has been taken before the Court by either of the parties.

No change occurred during the year in the personnel of the bench of the Court. Since the death of Count Rostworowski in Poland on March 24, 1940, the Court has had only fourteen judges. Nine of the judges were elected in 1930, one in 1935, two in 1936, one in 1937 and one in 1938. The

* This is the twentieth in the writer's series of annual articles on the organization and work of the Permanent Court of International Justice, the publication of which was begun in this JOURNAL, Vol. 17 (1923), p. 15.

¹ Series A/B, No. 77.

² Series A/B, No. 79.

³ Series A/B, No. 80.

general election which was due to be held in 1939 was postponed, and the judges are now in office under a provision in Article 13 of the Statute that members of the Court "shall continue to discharge their duties until their places have been filled." It is to be noted that in spite of the fact that the payment of the judges' salaries has been suspended, none of them has resigned.

Measures were taken in 1940 looking toward the election of a successor to Count Rostworowski. The Secretary-General of the League of Nations invited national groups to nominate candidates by August 15, 1940, but under the prevailing conditions only three national groups responded to this invitation; the Finnish national group nominated Mr. Nicolas Politis (Greece) and Mr. Max Huber (Switzerland), the Rumanian group nominated Professor Stelio Sfériadès (Greece), and the Swedish group nominated Judge Emil Sandström (Sweden). No further steps have been taken toward holding the election, as the Council and the Assembly of the League of Nations have not since met.

The President of the Court, Judge Guerrero (of El Salvador), and the Vice-President, Judge Hurst (of Great Britain), were originally elected for three-year terms to expire at the close of 1939; by a special decision the Court held the provision in Article 13 of the Statute to be applicable to them, so that they continue in office. The Registrar of the Court, Mr. López Oliván (of Spain), was elected in 1936 for a term expiring in 1943. The President and the Registrar left The Hague in July, 1940, when they found it impossible to carry on their work there; since that time they have continued to discharge their duties from Geneva. The personnel of the Registry was greatly reduced in 1940, and at the present time it consists of only five persons. The Court's premises in the Peace Palace at The Hague are intact, and its archives remain there.

The members of the Court's chambers have also continued in office by application of the provisions in Article 13 of the Statute. The Chamber for Labor Cases consists of Vice-President Hurst and Judges Altamira, Urrutia, Negulesco and Hudson, with Judges van Eysinga and Nagaoka as substitute members. The Chamber for Communications and Transit Cases consists of President Guerrero and Judges Fromageot, Anzilotti, van Eysinga, and Cheng, with Judge Nagaoka as a substitute member. The Chamber for Summary Procedure consists of President Guerrero, Vice-President Hurst, and Judges Fromageot and Anzilotti, with Judges Urrutia and de Visscher as substitute members.

In view of its diminished activity and on account of the dwindling of the funds of the League of Nations, the budget of the Court has been greatly reduced. The Court's expenditure of 2,383,638 Swiss francs was authorized for 1940, and the actual disbursements in that year amounted to 1,707,350 Swiss francs. For 1941, an expenditure of 500,000 Swiss francs was author-

ized by the Supervisory Commission of the League of Nations;⁴ the reduction required a suspension of the judges' salaries, in lieu of which only small payments on account have been made. The salaries of the Court's officers have been reduced, but they continue to be paid. The payments to the Carnegie Foundation of the Netherlands for the Court's use of premises in the Peace Palace have been suspended. In addition to the funds made available by the League of Nations during 1941, a contribution was paid by one State which is not a member of the League of Nations; on October 23, 1941, Brazil paid a contribution of 29 units, amounting to 33,882 Swiss francs. Meeting at Montreal in July, 1941, the Supervisory Commission approved a budget for the Court which authorizes an expenditure of 500,000 Swiss francs for 1942; if funds of that amount are available, the Court will therefore be able to continue its expenditures in 1942 on the scale obtaining in 1941. The financial outlook of the Court is affected of course by that of the League of Nations; and the contributions to the support of both organizations are reduced by the withdrawal of States from membership in the League. Chile and Venezuela ceased to be members of the League in 1940, and Hungary, Peru and Spain withdrew in 1941;⁵ but in giving notice of their intended withdrawal, Chile, Hungary and Peru expressed an intention to continue their participation in the maintenance of the Court.

The Court's publications have been greatly reduced. One number of Series C (Number 88) is in course of publication, but the other series have been suspended for the time being.

No action was taken by any State during the year with reference to the Protocol of Signature of December 16, 1920, to which the Statute of the Court is annexed; some fifty States continue to be parties to that instrument. Nor was any new declaration made during the year under paragraph 2 of Article 36 of the Statute, accepting the Court's compulsory jurisdiction. On the other hand, some of the "optional clause" declarations have now expired; a few years ago such declarations were in force for as many as 42 States, and at the end of 1941, some 27 States continued to be bound by them. Aside from these declarations, numerous multipartite and bipartite treaties continue in force by which jurisdiction is conferred on the Court; a collection of texts governing the jurisdiction of the Court published by the Registry, which "mentions all the instruments already in force or merely signed which in any manner confer jurisdiction on the Court or on its

⁴League of Nations Document, C.53.M.50.1941.X. The present Swiss franc is equivalent to 0.70730653 gold franc. On May 19, 1920, the League of Nations adopted a standard gold franc, containing 0.2903225 of a gram of fine gold (100% fine), which is equivalent to 1.41381418 Swiss franc.

⁵A notice of withdrawal given in the name of Albania on April 13, 1939, was referred by the Council to the Assembly without any pronouncement on its validity, and no action was taken by the Assembly. See League of Nations Official Journal, 1939, pp. 246-248.

President," lists 564 international instruments, many of which continue to be operative at least in part. The Geneva General Act of 1928, to which more than twenty States have acceded, is especially important because it continues in force for successive five-year periods unless denounced.

AFTER TWENTY YEARS

Twenty years have now passed since the Court opened its doors to the States of the world. In normal times the close of a second decade in the Court's history might have been hailed as an occasion for a critical appraisal of its usefulness.⁶ In the cataclysm which has now come upon the world, there may be some people who have been so disappointed in the hopes which they had entertained for the Court that they feel entirely disillusioned as to the rôle which such an agency may play in international life; the more discriminating, however, will not be tempted to minimize the contribution which the Court has made, even though it has not prevented the frustration of law and order of the present moment, and the record is one in which they may take a good measure of satisfaction.

Sixty cases have come before the Court in this period.⁷ These cases varied greatly in the problems which they presented, but all of them were cases of some magnitude. Each of them had importance for the peoples directly concerned, and some of them were significant for international relations generally. Fortunately, most of the cases were more or less removed from the surge of high politics, but in a few instances questions were presented of immediate bearing on political issues which were attracting current attention.

The methods followed by the Court in handling these sixty cases have commended themselves to a wide public, both professional and non-professional. The procedure which it has worked out has, on the whole, produced a general satisfaction. Confidence has been built up in the Court's thoroughness and impartiality, and it has been bolstered by the scrupulous care which the Court has taken to avoid any exceeding of its jurisdiction. Since its early days, the Court has taken the view that it "cannot, even in giving advisory opinions, depart from the essential rules" guiding its activity as a court of justice. A few of the judgments and opinions have been criticized—the judgment in the *Lotus Case*⁸ and the opinion in the case relating to the Austro-German Customs Régime⁹ especially—but for the most part the criticism has been kept within the bounds of what any public institution must expect.

The contribution made to the settlement of actual disputes in the sixty

⁶ See Manley O. Hudson, "Ten Years of the World Court," 11 *Foreign Affairs* (1932), pp. 81-92.

⁷ The Court's jurisprudence down to 1936 has been reproduced in the three volumes of *World Court Reports*, edited by Manley O. Hudson and published by the Carnegie Endowment for International Peace in 1934, 1935 and 1938; a fourth volume, covering the period from 1936 to 1941, will be published in 1942.

⁸ (1927) Series A, No. 10.

⁹ (1931) Series A/B, No. 41.

cases was, in itself, worth while. It may be too much to say that the Court prevented disturbances of the world's peace in any considerable number of cases, but its success was most pronounced in cases of the kind which have often brought such a result in the past. In the Jaworzina dispute between Czechoslovakia and Poland in 1923,¹⁰ in the Mosul Boundary dispute between Great Britain and Turkey in 1925,¹¹ in the Free Zones Case between France and Switzerland in 1932,¹² and in the Eastern Greenland Case between Denmark and Norway in 1933,¹³ the Court was confronted with situations involving the parties' "national honor and vital interests," and in each of these cases the Court's pronouncement brought prompt end to the controversy. Some of the Court's advisory opinions have contributed to the settlement of disputes which had arisen in the functioning of international organizations—the International Labor Organization particularly—and have thus facilitated the progress of international coöperation.

The influence of a successful judicial tribunal is not limited to the disputes which actually come before it. It extends, also, to many disputes which are settled by direct negotiation between the parties and settled the more easily because of a possibility in the background that the parties or one of them may appeal for the aid of the tribunal. Avoidance of resort to the existing tribunal thus becomes a desideratum which often works toward the success of direct negotiations. There can be no doubt that the Court has had such influence in these twenty years. In one instance—the *Castellorizo Case* between Italy and Turkey in 1929¹⁴—the parties reached agreement by direct negotiation in preference to continuing the proceeding which had already been begun before the Court.¹⁵

The jurisprudence of the Court has had a great influence on international law. The 32 judgments, 27 advisory opinions and numerous important orders which have been handed down are cited throughout the world, and perhaps it is not too much to say that they have furnished new directives both to the theory and the practice of international law. The volume of this jurisprudence constitutes a mine for the future development and extension of the law of nations. In this respect the earlier judgments and opinions may be thought to have been more useful than the later ones, for in recent years the Court has been very circumspect in its exposition of principles.

The influence of the Court has been especially noticeable with respect to the extension of the law relating to the pacific settlement of disputes. Barely a generation ago, the Peace Conferences at The Hague found it impossible to agree upon any measures of obligatory settlement, and even in bipartite treaties it was usual to limit the provisions in such a way that it

¹⁰ Series B, No. 8.

¹¹ Series B, No. 12.

¹² Series A/B, No. 46.

¹² Series A/B, No. 53.

¹⁴ See Series A/B, No. 51.

¹⁵ Cf., the *Borchgrave Case* between Belgium and Spain (1937) Series A/B, No. 72.

should remain within the option of either party to escape the obligation. The United States-Netherlands Convention of May 2, 1908, for example, applied to disputes "of a legal nature or relating to the interpretation of treaties" but with a proviso "that they do not affect the vital interests, the independence, or the honor of the two contracting States," and no arbitration could be conducted until the two parties to the dispute had concluded a special agreement (*compromis*) defining the matter in dispute and had reached an agreement for constituting a special arbitral tribunal. The styles in vogue in numerous arbitration treaties have now changed greatly. With the Court at hand, disputing States do not have to constitute a special tribunal; numerous recent treaties make a special agreement (*compromis*) unnecessary; the exception concerning vital interests and national honor has all but disappeared; and the category of arbitrable disputes has been greatly enlarged. Recent multipartite instruments also register a great advance: 47 States have at one time or another accepted the Court's compulsory jurisdiction over legal disputes by making binding declarations under paragraph 2 of Article 36 of the Statute, and some 23 States have become parties to the Geneva General Act of 1928, which has a wide sphere of application. Moreover, in international instruments relating to all kinds of subjects, it has become the common practice to insert provisions for the jurisdiction of the Court over disputes arising with reference to the interpretation or application of their provisions—even the United States which has not joined in the support of the Court has thus submitted to its compulsory jurisdiction by Article 423 of the Constitution of the International Labor Organization.¹⁸ Only a few States of the world have stood aloof from the movement toward the extension of peaceful processes. This striking development can be traced directly to the existence of the Court, and to the general satisfaction with the service it has rendered.

It seems important in these times that there should be no exaggeration of the rôle of a court in international affairs, for exaggeration can only lead to disappointment and discouragement. There are many things which a court cannot well do, which indeed it should not be asked to do. There are many functions which must be entrusted to other international agencies. The judicial application of national law is restricted, and even national courts would fail to command respect if they exceeded the proper bounds of the judicial function. The limitation is even more important in the international sphere, where centuries of judicial tradition are lacking, where no marshal is at a court's command, and where no strong executive exists to compel respect for its judgments. Too much cannot be expected of an agency whose operations must be confined within the limits of an existing, though expanding, body of law. A court overloaded with functions not properly judicial might soon cease to exist.

¹⁸ U. S. Treaty Series, No. 874.

It is equally important, on the other hand, that the solid achievements in this field should be appreciated, and that they should be given due place in any planning for the future. A whole generation of intelligent and conscientious effort preceded the establishment of the Permanent Court of International Justice. The way was first paved by a succession of bipartite treaties, for the underlying ideas of which the States of the Americas may claim a share of the credit. These ideas were carried further by the Peace Conferences at The Hague which established a useful framework known as the Permanent Court of Arbitration. The same ideas came into larger fruition in the Statute of the Permanent Court of International Justice. For twenty years, this Court has carried the banner of international justice according to law. Scores of Governments and literally hundreds of men throughout the world have labored to make it a success, and their labors have not been in vain. The record is an open book. The successes as well as the failures merit judgment. Even if some new lines should have to be forged for the future, the struggles of the past will not need to be waged again. The present skies may be overcast, but fortunately the Court continues to exist, and it holds itself in readiness to serve the peoples of the world in the years which lie ahead.

REPEAL OF THE NEUTRALITY ACT

BY QUINCY WRIGHT
Of the Board of Editors

On November 17, 1941, the President signed an Act repealing Sections 2, 3, and 6 of the Neutrality Act of 1939 and authorizing him during the unlimited national emergency proclaimed on May 27, 1941, to arm United States merchant vessels.¹ The repealed provisions had required transfer of title of all goods before export to belligerents and had prohibited American ships from being armed, from trading with belligerent ports, and from passing through combat areas proclaimed by the President. With elimination of the arms embargo by the Act of November 4, 1939, practical elimination of the loan prohibition by the Lend-Lease Act of March 11, 1941, and elimination of the "cash and carry" and "combat area" provisions by the present Act, the experiment in a new type of neutrality which Congress originated in 1935 was practically ended.

There remain of the Neutrality Act of 1939 authority for the President or the Congress² to find that a state of war between foreign states exists or has ceased to exist (Section 1); exemptions of Red Cross vessels (Section 4); prohibition of travel by American citizens in belligerent vessels (Section 5); prohibition of private loans or donations to belligerents except for humanitarian purposes (Sections 7 and 8); exemption of American Republics from the Act (Section 9); and authority for the President to require bonding of vessels leaving American ports (Section 10), to regulate use of American waters by foreign submarines and armed merchant vessels (Section 11), and to issue regulations to carry out the Act (Section 13). The provisions establishing the National Munitions Control Board and the system of licensing munitions exports also remain, as do the provisions prohibiting the use of the American flag on foreign vessels and denying to ships violating this rule the use of American ports for three months (Section 14). The remaining provisions which continue in force (Sections 15-20) concern penalties, definitions of terms, separability of provisions, appropriations, and repeals of earlier legislation.

The repealing Act has immediate significance in reference (1) to the renunciatory neutrality policy adopted in 1935, but it also has an important bearing upon (2) the traditional neutrality policy of the United States es-

¹ Public Law 294, 77th Cong. The Act also provides that Sec. 16 of the Criminal Code relating to bonds from armed vessels on clearing should not apply to vessels armed under the Act.

² The authorization of Congress to act by concurrent resolution is probably unconstitutional. See Q. Wright, "The Power to Declare Neutrality under American Law," this JOURNAL, Vol. 34 (1940), p. 307.

tablished by the Act of 1794, with amendments up to 1917, and upon (3) the conception of neutrality as an international status developed in the eighteenth century, accepted in the nineteenth century and codified in the Hague Conventions of 1907.

1. RENUNCIATORY NEUTRALITY POLICY

The repealing legislation constituted a recognition by the Congress and the Executive of the failure of the concept which grew out of the Nye munitions investigation of 1934 and 1935, that renunciatory neutrality legislation could keep the country out of war. The Nye investigation gave publicity to a theory of why the United States got into the first World War, why states generally get into war, and how the United States could keep out of future wars, which never gained important support among students of history, international relations or international law,³ but which swept public opinion and induced legislation⁴ whose consequences can only be described as tragic.

This theory ignored the influence of defensive necessities under a balance of power system and of public opinion affected by moral convictions and interested propagandas in getting countries into war. It attributed an exaggerated importance to the economic interests benefiting from war and to juristic claims and public excitement over "incidents."⁵ The theory assumed that peace would be assured if legislation could prevent the munition makers and bankers from gaining profits from trade with belligerents, could prevent the profits of American firms or the prosperity of the country from being linked with the victory of either belligerent faction, and could keep American citizens and vessels away from areas where they might be sunk by belligerent action. The lack of adequate historical foundation for this theory and the insufficient insight into the realities of international politics which it displayed, justified the scepticism with which the attempt to apply it to a period of unparalleled emergency was greeted in informed circles.⁶

³ The prevailing opinion is stated by Edwin Borchard and W. P. Lage (*Neutrality for the United States*, New Haven, 1937, p. 314): "It is doubtful whether the committee proved the thesis that munition makers and bankers forced the United States into war." See Newton D. Baker, *Why We Went to War*, New York, 1936; Charles Seymour, *American Neutrality, 1914-1917*, New Haven, 1935.

⁴ See Borchard and Lage, *op. cit.*, p. 314 ff.; Philip C. Jessup, *Neutrality: Its History, Economics and Law*, New York, 1936, Vol. 4, p. 124 ff.

⁵ See Q. Wright, *The United States and Neutrality*, Public Policy Pamphlet, No. 17, Chicago, 1935; Schuyler Foster, "How America Became Belligerent: A Quantitative Study of War News, 1914-17," *American Journal of Sociology*, January, 1935, Vol. 40, p. 464 ff.

⁶ "It may turn out that they (the Neutrality Acts, 1935-39) merely served as patterns for a mess from which it will be difficult to extricate ourselves." Francis Deák, "The United States Neutrality Acts, Theory and Practice," *International Conciliation*, No. 358, March, 1940, p. 114.

"The results . . . would probably be bad from the standpoints both of those who are interested merely in keeping the United States out of war and of those who are interested in

The President's statements at the time he signed the original Act and subsequently make it doubtful whether he would have signed it had it not been that one provision of the original Act—that embargoing arms shipments to belligerents—fitted in with the policy of collaborating with the League of Nations in sanctions to prevent the then impending Italian war against Ethiopia.⁷ Under the circumstances of those hostilities, which broke out in spite of the passage of the Act, Ethiopia, the victim of aggression, did not need to import arms from the United States because it could obtain them from League members, consequently the bilateral character of the embargo required by the American law would not greatly impair its value as a sanction against Italy. The embargo, however, applied only to manufactured arms and not to war materials. The latter are likely to be the only imports desired by an industrialized aggressor. Oil in fact was the major import wanted by Italy. Since this Act did not authorize an embargo on oil, it proved inadequate for the purpose of dealing with the Ethiopian hostilities.

The normal tendency of the bilateral embargo to favor aggressive industrialized states was so patent in the Far Eastern hostilities which broke out in 1937 that the President never recognized them as war and the Act has never been applied in that area. The same position was taken in regard to the Russo-Finnish hostilities of 1939 and the German-Russian hostilities of 1941. In the first of these instances, the Act was not applied because it would have aided the Russian aggression, and in the second instance it was not applied because it would have aided the German aggression.

The Spanish Civil War broke out in 1936, but the Act as it then appeared on the statute books did not apply. The embargo was, however, extended to cases of "civil strife" by the amendment of April, 1937, carrying out the

preventing war in the world. This needs to be stated plainly, because a vast amount of sentiment has been rallied to the support of isolationist neutrality under the delusion that it represents a peace policy." Eugene Staley, *Raw Materials in Peace and War*, New York, 1937, p. 43. See also *War Losses to a Neutral*, League of Nations Association, New York, December, 1937.

"The derision of neutrality has given rise to iconoclastic measures which can only be understood in the light of unneutral policies of 1914-17. How they will serve remains to be seen." Borchard and Lage, *op. cit.*, p. 343.

"American efforts to combine a firm and impartial neutrality with a degree of participation in the sanctions program have been severely criticized on various sides." Georg Cohn, *Neo-Neutrality*, New York, 1939, p. 120.

"It is probably unduly complimentary to that statute (1935) to credit it with any one rational underlying thesis." Jessup, *op. cit.*, Vol. 4, p. 124.

See also Q. Wright, "The Lend-Lease Bill and International Law," this JOURNAL, Vol. 35 (1941), p. 312.

⁷ Department of State, Press Releases, Aug. 31, 1935, Vol. 13, pp. 162-3, and comments by Borchard and Lage, *op. cit.*, p. 315 ff., and Jessup, *op. cit.*, p. 125. In his message to Congress, Sept. 21, 1939, President Roosevelt said: "I regret that the Congress passed that Act. I regret equally that I signed the Act." Department of State Bulletin, Sept. 23, 1939, Vol. I, p. 277.

principle of the special resolution of January, 1937, which dealt explicitly with the Spanish situation. This resulted in assistance to the Franco rebels and aid to the totalitarian despots contrary to the general policy of the United States.

Application of the Act to the German aggression of September, 1939, at once proved so subversive of American policy and opinion that Congress modified the Act in November, 1939, by repealing the arms embargo. The President transcended the spirit of the Act by trading destroyers for naval bases in the summer of 1940, and Congress did the same by providing for large-scale loans to one side in the hostilities in the Lend-Lease Act of March, 1941.⁸

It can fairly be said that there was no instance of the application of this theory of neutrality in which it contributed to maintaining the peace of the United States, the peace of the world, respect for international law, or the interests of a free and stable world order. Its effect, as anticipated by most informed observers, was to give American opinion a sense of frustration inducing belligerency, to encourage aggression by the despots in Europe and Asia, and to thwart the democracies from achieving a unity of purpose in the defense of their interests and principles. Its enactment is one phase of the tragedy by which the defenders of democracy and law in the 1930's seemed intent on committing suicide.

It is to be hoped that after six years of expensive experience the recent Act of Congress, followed in three weeks by the declarations of war against the United States by Japan, Germany, and Italy, will have given the *coup de grâce* to the theory that the United States by renouncing its rights under international law and attempting to isolate itself from world commerce and world politics can remain at peace. It seems clear that the Japanese attack upon Pearl Harbor was planned prior to the repeal of the Neutrality Act.

2. TRADITIONAL NEUTRALITY POLICY

Though it eliminated the neutrality theory of 1935, the repealing Act was not explicitly intended to eliminate the traditional American policy of neutrality. In fact the Senate Committee on Foreign Relations in reporting it wrote:

Any assumption that by the provisions of this resolution our status of neutrality will be changed is entirely erroneous. The status of neutrality is determined solely by international law. The voluntary restrictions imposed by the Neutrality Act of 1939 were in derogation of American rights under international law, and by repealing Sections 2, 3 and 6 of such Act the United States is merely restored to the same status of a neutral which it had under international law prior to the enactment of such sections.⁹

⁸ Q. Wright, "The Transfer of Destroyers to Great Britain," this JOURNAL, Vol. 34 (1940), p. 680 ff.; "The Lend-Lease Bill and International Law," *supra*.

⁹ 77th Cong., 1st Sess., Sen. Rep. No. 764, p. 3.

The House Committee on Foreign Affairs made no such statement. Instead it emphasized the testimony of the Secretary of State, that "New conditions have been produced by the Hitler movement of world invasion," requiring "the most effective means of self-defense."¹⁰ The minority of the House Committee thought passage of the Act would be "another step toward war."¹¹

There seemed to be little in the attitude either of the House Committee or of the members of the cabinet or of the President to support the Senate Committee's theory that the United States was reverting to the condition of a neutral under international law as it was understood in the nineteenth century. The Secretary of State, in fact, explicitly asserted,

The Congress has enacted and the Executive is carrying out a policy of aiding Great Britain and other nations whose resistance to aggression stands as the one great barrier between the aggressors and the hemisphere whose security is our security.¹²

Such a position obviously cannot be reconciled with the impartiality which, according to the text-writers and the Hague Conventions, is the essence of neutrality. Viewed in the light of history it seems fair to interpret the repealing Act as another step toward acceptance of President Wilson's assertion that:

Neutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its peoples, and the menace to that peace and freedom lies in the existence of autocratic government backed by organized force which is controlled wholly by their will, not by the will of their people. We have seen the last of neutrality in such circumstances.¹³

From Washington's proclamation of neutrality on April 22, 1793, to President Wilson's address of April 2, 1917, neutrality in the sense of legal impartiality in foreign wars was the official policy of the United States. It was supported by legislation, punishing acts of assistance to either belligerent from American territory or by American citizens, by executive proclamations on the outbreak of foreign wars, by American diplomatic protests which assumed that international law defined the rights and duties of neutrals, and by American pressure in international conferences to codify the law of neutrality on the basis of neutral duties of impartiality and neutral rights of freedom of the seas.¹⁴

¹⁰ 77th Cong., 1st Sess., House Rep. No. 1267, p. 2.

¹¹ *Ibid.*, p. 10.

¹² *Ibid.*, p. 2.

¹³ War Message, April 2, 1917, J. B. Scott, ed., *Official Statements of War Aims and Peace Proposals*, December, 1916, to November, 1918, Washington, 1921, p. 89.

¹⁴ See J. B. Moore, *The Principles of American Diplomacy*, New York, 1918, Chap. 2; Borchard and Lage, *op. cit.*, Chap. 2. The documents are printed in Francis Deák and Philip C. Jessup, *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries*, Washington, 1939, Vol. 2, p. 1079 ff.

This policy did not mean that the United States would not intervene or declare war when it considered its own interests involved, but it did mean that it anticipated few European or other foreign controversies or wars which would involve those interests. Washington, it is true, in his farewell address cautiously limited this anticipation to the period immediately ahead when America's "yet recent institutions" remained immature.¹⁵ Subsequent commentators, however, have interpreted his address as intended for all time. In any case this anticipation was not justified by history. The United States Government found that American interests were so involved in Europe and the Mediterranean during the French Revolutionary and Napoleonic period as to require hostilities against France in 1798, against Tripoli in 1801, against Tunis in 1805, against Great Britain in 1812, and against Algiers in 1815. American interests in this area did not again call for hostilities for a century, although relations with Great Britain, France and Spain became badly strained or broken on several occasions over territorial problems, fishery problems, or maritime claims arising in the American hemisphere. American interventions in Latin America and Asia were frequent.

The century from Waterloo to the Marne, so far as Europe was concerned, was a remarkably peaceful one, more peaceful than any century Europe had known at least since the *Pax Romana* of the second century, A.D. Trade was relatively free and wars were localized. This was in large measure due to the influence of British naval, commercial and financial power, exercised, in the main, to promote economic liberalism and to preserve the balance of power.¹⁶ After British influence was relatively reduced, because of changes in military and naval technique and the rise of competing centers of commerce and finance, general wars broke out in Europe. American neutrality failed, and the United States and several other American countries declared war against Germany and Austria in 1917. The collapse of neutrality was more rapid when general war again broke out in 1939. In spite of the anticipations of the advocates of the policy of neutrality, in every general European war which has occurred, since its independence, the United States has found its commercial or political interests so involved that it abandoned neutrality.

Although the tradition of neutrality did not prove to be as dead as President Wilson had thought it was, it never reacquired its earlier prestige after 1917. Americans had become aware of serious shortcomings in a declared policy of neutrality for a great Power interested in political stability, in

¹⁵ "With me a predominant motive has been to endeavor to gain time to our country to settle and mature its yet recent institutions, and to progress without interruption to that degree of strength and consistency which is necessary to give it, humanly speaking, the command of its own fortunes." J. D. Richardson, *Messages and Papers of the Presidents*, Washington, 1909, Vol. 1, p. 224.

¹⁶ Q. Wright, "The Present Status of Neutrality," this JOURNAL, Vol. 34 (1940), p. 410 ff.

opportunities for peaceful trade, in respect for international law, and in maintenance of moral responsibility. Though it rejected the League of Nations, the conditions both of the world and of America which had made the policy of neutrality seem reasonable in the century before 1914 were gone forever.

A few stalwart conservatives, it is true, thought the old neutrality based on impartiality and freedom of the seas was still possible. A larger number urged a whole-hearted abandonment of neutrality by accepting responsibility to prevent and suppress aggression through the League of Nations. Others urged the whole-hearted abandonment of extra-hemispheric interests and an isolation of American life within the Western Hemisphere. The largest proportion favored a *via media*, avoiding both positive commitments to apply sanctions and positive expectations of neutrality.¹⁷

The latter policy has anticipated American concern in foreign wars and has asserted freedom to intervene as interests, policy, and a sense of moral responsibility suggested. This policy was adopted in the Pact of Paris and has been repeated on numerous occasions by both Republican and Democratic administrations.¹⁸

¹⁷ Q. Wright, "The Present Status of Neutrality," this JOURNAL, Vol. 34 (1940), pp. 393-4.

¹⁸ Harvard Research in International Law, Draft Convention on Aggression, this JOURNAL, Supp., Vol. 33 (1939), p. 844 ff.

A Department of State memorandum submitted to the House Committee on Foreign Affairs during the latter part of the Hoover administration opposed a bilateral arms embargo and stated: "Much of the old conception of neutrality as a possibility is gone in the modern world if large nations are involved in war." Borchard and Lage, *op. cit.*, p. 307.

In a letter to Col. House in 1918 Elihu Root wrote: "The view now assumed and generally applied is that the use of force by one nation towards another is a matter in which only the two nations concerned are primarily interested, and if any other nation claims a right to be heard on the subject it must show some specific interest of its own in the controversy. . . . The requisite change is an abandonment of this view, and a universal, formal and irrevocable acceptance and declaration of the view that an international breach of the peace is a matter which concerns every member of the Community of Nations—a matter in which every nation has a direct interest, and to which every nation has a right to object." Charles Seymour, *The Intimate Papers of Colonel House*, Vol. 4, p. 43. See also Root, "The Outlook for International Law," Proceedings, American Society of International Law, 1915, pp. 7-9; Jessup, *Elihu Root*, New York, 1939, Vol. 2, p. 376.

Secretary of State Stimson said on Aug. 8, 1932: "The laws of neutrality became increasingly ineffective to prevent even strangers to the original quarrel from being drawn into the general conflict. . . . War between nations was renounced by the signatories of the Briand-Kellogg Pact. . . . Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers—violators of the general treaty. We no longer draw a circle about them and treat them with the punctilios of the duelist's code. Instead we denounce them as lawbreakers. . . . Under the former concepts of international law when a conflict occurred, it was usually deemed the concern only of the parties to the conflict. The others could only exercise and express a strict neutrality alike towards the injured and the aggressor. . . . Now under the covenants of the Briand-Kellogg Pact such a conflict becomes of legal concern to everybody connected with the treaty. . . . As was said by M. Briand, quoting the words of President Coolidge: 'An act of war in any part of the world is an act that in-

The League was rejected without trial in 1920. The "storm-cellar" neutrality policy has now been rejected after five years' trial. The policy of "concern", which was never abandoned by the administration during these years of experimentation has been reasserted by the administration, with a distinct leaning toward the reestablishment of collective security after the war. The Government, while reaffirming freedom of the seas, has disavowed impartiality and has justified economic and naval discrimination against the German Government and its allies on grounds of defense, reprisals, and sanctions against aggression.¹⁹

The twenty-year debate has been inconclusive with respect to positive policy, but it has been conclusive in a negative sense. The pre-1914 tradition which presumed that neutrality as juridically defined in the Hague Conventions and the Declarations of Paris and London constituted an adequate policy for the United States when faced by European wars appears to be dead beyond revival. The United States is a great Power with world-wide interests and the world is shrinking. Under these conditions the United States can not insulate the interests of the American people from serious impairment by foreign war. It can neither prevent war nor protect interests by a policy of neutrality.

3. NEUTRALITY AND INTERNATIONAL LAW

The British international lawyer William E. Hall wrote in 1880:

The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals, but it represented by far the most advanced

juries the interests of my country.' The world has learned that great lesson and the execution of the Briand-Kellogg Treaty codified it." *Foreign Affairs*, Special Supplement to Vol. 11, No. 1.

In his statement of July 16, 1937, endorsed by most of the states of the world, Secretary Hull wrote: "Any situation in which armed hostilities are in progress or are threatened is a situation wherein rights and interests of all nations either are or may be seriously affected. There can be no serious hostilities anywhere in the world which will not one way or another affect interests or rights or obligations of this country." *Fundamental Principles of International Policy*, Washington, 1937, p. 1.

See also Q. Wright, "Neutrality and Neutral Rights following the Pact of Paris," Proceedings, American Society of International Law, 1930, p. 79 ff.; "The Present Status of Neutrality," this JOURNAL, Vol. 34 (1940), p. 407; Norman Wait Harris Memorial Foundation, "An American Foreign Policy Toward International Stability," Public Policy Pamphlet, Chicago, 1934, 2nd ed. 1938, p. 32 ff.; W. N. Hogan, "The Problem of Non-belligerency Since the World War," Manuscript Thesis, University of Chicago Library, 1939.

¹⁹ Q. Wright, "The Lend-Lease Bill," *loc. cit.*, p. 308. See also President's message, Oct. 9, 1941, and statements of the Secretaries of State, War, and Navy in Hearings before the Committee on Foreign Affairs of the House on H. J. Res. 237, "Arming American Merchant Vessels," October, 1941, repeated in part in House Report No. 1267, 77th Cong., 1st Sess.; and Statement of Secretary of State in Hearings before the Committee on Foreign Relations, U. S. Senate, on H. J. Res. 237, "Modification of Neutrality Act of 1939," October, 1941.

existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations.²⁰

No one state can make international law. Most other states, however, have moved faster than the United States in abandoning nineteenth century standards of neutrality.²¹ If the United States has now abandoned these standards as an established policy, the position of this branch of international law will undoubtedly be affected. The nature of this effect will, however, be influenced by the reasons for action. In the discussions concerning the Lend-Lease Act and the recent repeal Act, self-defense, reprisal, and sanction against aggression have all been set forth as justifications for departures from neutrality. In its report on the Lend-Lease Act the House Committee on Foreign Affairs set forth all three of these reasons:

In the first place, it is a firmly established principle of international law that a nation is justified in acting in its own self-defense. Secondly, mutuality is an accepted principle of international law as well as of equity, and a nation which violates the basic rules of international law is not in a position to claim that another nation, in the interest of its own defense, is not complying with the less basic rules of international law. Furthermore, the Kellogg-Briand Pact, which is a part of international law, not only was intended to outlaw force as a means of resolving international disputes, but its violation has also been regarded by many distinguished international lawyers as giving any signatory the power: "to decline to observe toward the state violating the Pact the duties prescribed by international law, apart from the Pact, for a neutral in relation to a belligerent: (and to) supply the state attacked with financial or material assistance including munitions of war."²²

The adequacy of these three grounds of justification may be considered.

4. NEUTRALITY AND SELF-DEFENSE

Self-defense as a justification under international law for violent action has always been considered applicable only in "cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation." Furthermore, while a state acting in self-defense must necessarily make the initial decision on what action is appropriate, the ultimate determination of justifiability must depend upon the findings of an international procedure, not upon the self-determination of the state making the plea.²³

²⁰ A *Treatise on International Law*, 8th ed., Oxford, 1934, p. 707.

²¹ By ratifying the League of Nations Covenant. See Cohn, *Neo-Neutrality*, p. 43 ff.

²² 77th Cong., 1st Sess., House Rep. No. 18, pp. 5-6.

²³ Q. Wright, "The Meaning of the Pact of Paris," *this JOURNAL*, Vol. 27 (1933), p. 44 ff.; J. L. Brierly, *The Law of Nations*, 2nd ed., Oxford, 1936, p. 253 ff.; H. Lauterpacht, *Oppenheim's International Law*, 6th ed., London, 1940, p. 155.

In international politics, the term self-defense has been used with a much broader connotation. Thus the Monroe Doctrine and other policies of territorial propinquity and balance of power have been followed by states because they considered them necessary for their self-preservation.²⁴ Such policies, even though action under them encroaches upon the rights of other states, may be morally and politically justifiable when conditions prevail in which respect for international law is not to be anticipated, but it is clear that, if such action were admitted as a legal justification under normal conditions, international law would be seriously impaired, if not destroyed altogether. A state innocent of actual, or immediately potential, wrongdoing cannot be deprived of legal rights merely because its increase of power or its declarations of policy create a presumption that it is meditating wrongdoing in a distant future. While the administration of law must qualify normal rights in consideration of committed, or certainly to be committed, illegal acts, it cannot do so because of possible or even of probable illegalities in the future. While law may interpret acts by motives and intentions, it must deal with acts. It cannot deal with motives and intentions in themselves. To deprive a state of its established rights because of suspicion of its motives and intentions is to depart from the rule of law. It is doubtless true that in a lawless world each state can only preserve itself by doing exactly that, but such a justification cannot be accepted in law. As a moral or political justification it depends upon the assumption that law has ceased to function, that the legal order has been suspended and jungle conditions prevail.²⁵

While self-defense in a legal sense would probably permit a neutral to arm merchant vessels for defense against illegal attack by belligerent submarines, it may be doubted whether it can be stretched to justify neutral acts to forbid belligerent action in areas of the high seas hundreds of miles from neutral shores or to lend or lease through government channels large quantities of military material to aid one belligerent and not the other.²⁶

It is not denied that the dangers to the United States inherent in a victory of Hitlerism are real and that in a political sense everything should be done

²⁴ Q. Wright, "The Distinction between Legal and Political Questions with especial reference to the Monroe Doctrine," *Proceedings, American Society of International Law*, 1924, p. 57 ff.; "Territorial Propinquity," *this JOURNAL*, Vol. 12 (1918), p. 519 ff.; G. G. Wilson, *Handbook of International Law*, 3rd ed., St. Paul, 1939, pp. 55-71.

²⁵ "When a small injury is inflicted in obedience to an almost irresistible impulse, the law may overlook it, but in principle we may not hurt another or infringe his rights, even for our self-preservation, when he has not failed in any duty towards us. Self-preservation, when carried beyond this point, is a natural impulse, an effect of the laws to which human nature is subject in the stage of advancement to which it has yet attained. But the office of jural law is not to register and consecrate the effects of the laws of nature, but to control them by the introduction of the principle of justice, where an unreflecting submission to the tendencies which in their untamed state they promote would be destructive of society." John Westlake, *International Law*, Cambridge, 1910, Vol. 1, p. 311.

²⁶ Q. Wright, "Rights and Duties under International Law as affected by the Resolutions of Panama," *this JOURNAL*, Vol. 34 (1940), p. 246; "The Lend-Lease Bill," *loc. cit.*, p. 308 ff.

to prevent this victory, but it is believed that these dangers are not of the instant and overwhelming character which alone can legally justify defensive action in breach of the normal rights of another state.²⁷

5. NEUTRALITY AND REPRISALS

The doctrine of reprisal also appears to be unsatisfactory as a justification for wholesale departures from neutrality. It has been said that,

Reprisals are such injurious and otherwise internationally illegal acts of one state against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency.²⁸

Reprisals are said to be permissible only if the state acted against has been guilty of an international delinquency, if all peaceful means of settlement have failed, and if the action taken is proportional to the injuries suffered.²⁹ The latter condition suggests that reprisals can only be justified as measures for compelling reparation for completed injuries and not as means for stopping continuing injuries. This has been the usual conception of peacetime reprisals distinguishing them from wartime reprisals. It is only when injuries have been completed that damages can be measured and reparation for them assessed. Invocation of the doctrine of reprisals in this sense would, therefore, seem to require that the United States make a claim for reparation from Germany for concrete injuries it has suffered, and that it resort to reprisals only when Germany has refused peaceful procedures for dealing with this claim, and that the reprisals be proportionate to the injuries upon which the claim is based.

It is clear that the action taken by the United States to defeat Hitlerism cannot be brought within this conception of reprisals. It may even be argued that measures under this conception of reprisals would violate German rights in so far as those measures have a nonpeaceful character, such as shooting at German submarines. The Pact itself bars any but peaceful means for settlement of any dispute whatsoever. Thus Germany itself might invoke the Pact against the United States if the United States attempted to justify its nonpeaceful measures on this theory of reprisals.³⁰

Reprisals have, however, been given a broader meaning, especially in time of war, as "acts of retaliation, resorted to by one belligerent against the enemy individuals or property for illegal acts of warfare committed by the other belligerent, for the purpose of enforcing future compliance with the recognized rules of civilized warfare."³¹ The Institute of International Law qualified this use of reprisals by formally forbidding them "in all cases

²⁷ But see C. C. Hyde, "Secretary Hull on the Kellogg-Briand Pact," this JOURNAL, Vol. 35 (1941), p. 118.

²⁸ Lauterpacht-Oppenheim, *op. cit.*, Vol. 2, p. 110.

²⁹ *Ibid.*, pp. 110-118.

³⁰ See Q. Wright, "Meaning of the Pact of Paris," this JOURNAL, Vol. 27 (1933), pp. 51-54.

³¹ United States, Rules of Land Warfare, Washington, 1914, Sec. 379.

in which the wrong complained of has been redressed," by insisting that the "manner of inflicting them, and their extent, must not be disproportionate to the infraction committed by the enemy," and by insisting that they may be inflicted "only under the authority of the commander-in-chief" and "must in all cases take account of the laws of humanity and morality."³²

This broader conception of reprisals has also been considered applicable to the relations of belligerents and neutrals. The Harvard Research in International Law recognized that "a neutral state shall not be deemed to have violated Article 4 (obligation of impartiality) of this convention by resorting to acts of reprisal or retaliation against a belligerent because of illegal acts of the latter."³³ Even this doctrine of reprisals, however, would permit a neutral to act only because of continuing injuries which it, itself, is suffering. In the debate on the repeal of the Neutrality Act, it was pointed out that the injuries suffered by the United States from German action had at that time been inconsiderable and not sufficient to justify the broad departure from neutrality which the United States contemplated.³⁴

A broader doctrine, closely related to this theory of reprisals, asserts that "every neutral state has a direct interest in the observance by belligerents of the law defining neutral rights, and a violation by a belligerent of a neutral right of one neutral state constitutes a violation of a neutral right of all neutral states."³⁵ This concept of a solidary interest of neutrals has been asserted in the Argentine Anti-War Treaty and in various Pan American declarations. In view of the serious injuries suffered by European states which attempted to remain neutral, the United States might justify its departure from neutrality on this principle.

An even broader concept of reprisals has held that states parties to the Pact of Paris may as a measure of reprisal deny the usual rights of belligerents *vis-à-vis* neutrals to another party to the Pact which resorts to hostilities in breach of the Pact. This principle is suggested by the statement in the preamble of the Pact itself that "any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by the treaty."³⁶

While these broad extensions of the doctrine of reprisals would doubtless permit the United States to withhold the advantages of the law of neutrality from a violator of the Pact, it extends the meaning of reprisals beyond that

³² Quoted, *ibid.*, from Rules of Oxford Session, Arts. 85, 86, J. B. Scott, ed., *Resolutions of the Institute of International Law*, New York, 1916, p. 42.

³³ Draft Convention on Rights and Duties of Neutral States in Case of Naval and Aërial War, Art. 14, this JOURNAL, Supp., Vol. 33 (1939), p. 329.

³⁴ See Statements by John H. Finnerty and Philip C. Jessup, Senate Hearings on Modification of Neutrality Act of 1939, pp. 194, 252.

³⁵ Harvard Research in International Law, Draft Convention on Neutrality, Art. 114, *loc. cit.*, p. 788.

³⁶ See Lauterpacht-Oppenheim, *op. cit.*, Vol. 2, p. 513; Q. Wright, "Meaning of the Pact of Paris," *loc. cit.*, pp. 59-60.

usually recognized in the past. The concept of reprisals has envisaged international relations as essentially bilateral relations, but this extension envisages them as multilateral or community relations. This concept of reprisals, could, therefore, be better described as sanctions. It looks toward a theory by which states act under the authority of the community as a whole to maintain law, rather than toward the theory, inherent in the idea of reprisals, of permissible self-help to remedy the state's own injuries.³⁷

6. NEUTRALITY AND SANCTIONS

It would appear, therefore, that if American departure from neutrality is to be justified on legal grounds, it must be on the theory of sanctions. The United States discriminated against the German Government and assisted the enemies of that government, not in its own defense, not to remedy its own injuries, but to frustrate the success of a government which had outlawed itself by its violation of the basic principles of international law. This behavior was justified because of the permission which international law gives all states to act in support of the international community against basic attacks upon its law. The action against the German Government was not of the nature of a civil remedy but of a preventive or deterrent of crime. The Pact of Paris and other treaties have established resort to violence in breach of the obligations accepted in these instruments as criminal aggression, and have removed such acts from the category of war entitling the belligerents to impartial treatment by third states.³⁸ International law has, thereby, been restored to the Grotian foundations and freed of the inconsistencies which the idea of neutrality gave to it in the late eighteenth and nineteenth centuries.³⁹

International lawyers have usually subscribed to Hall's statement that "The existence of a right to oppose acts contrary to law and to use force for that purpose when infractions are sufficiently serious is a necessary condition of the existence of an efficient international law."⁴⁰ They, however, have failed to perceive that a duty to observe neutrality, in a war made by one state in order to deprive another of its legal rights, is in conflict with this right of third states to maintain the law.

No one can deny that a system of international law sanctioned only by the freedom of states to intervene in its defense is imperfect. The guilty state should, in a developed system of law, be ascertained by objective procedures, and the circumstances and methods of intervention should be legally defined. But even with its imperfections, it may be doubted whether such a system is

³⁷ See above, note 18.

³⁸ See Q. Wright, "Meaning of the Pact of Paris," *loc. cit.*, and "The Present Status of Neutrality," *loc. cit.*

³⁹ *Ibid.*; C. VanVollenhoven, *The Three Stages in the Evolution of the Law of Nations*, The Hague, 1919, p. 95.

⁴⁰ Hall, *op. cit.*, p. 342.

less perfect than one which prohibits states, not directly concerned, from intervening, however gross may be the violations of law, and however serious they may be to the continuance of the international legal order as a whole. The new principle of permissive sanctions encourages the development of adequate procedures to define and suppress aggression, whereas the old principle of neutrality prevented effective procedures and encouraged aggression by the strong against the weak.⁴¹

The United States appears to have accepted the principle of permissive sanctions as the basis of its departure from neutrality. This doctrine, in fact, is no different from the principle of concern implicit in the Pact of Paris and asserted on numerous occasions by the President and the Secretary of State and by the Senate and the House Committees as a justification for the Lend-Lease Act. The theory was set forth at length and vigorously endorsed by the Attorney General in March, 1941.⁴²

While the reports of the Senate and House Committees on the recent repeal measure emphasized the principle of self-defense, official advocates of the measure in the House and Senate hearings repeatedly referred to the criminal character of Germany's aggression. "This failure," said Secretary Hull, "to realize and comprehend the vastness of the plan and the savagery of its unlimited objectives has been, and still is, the greatest single source of peril to those free people who are yet unconquered and who still possess and enjoy their priceless institutions."⁴³

The experience of the United States, added to that of the now occupied states of Europe who tried to be neutral, has done much to create the general conviction that neutrality as the normal status of nonparticipants in international hostilities is obsolete. Apparently killed by the experience of World War I, the status of neutrality was revived by the rejection of the League of Nations by the United States, and was reincarnated in various conventions of the 1920's, in several large books, and in the American statutes of the 1930's. The complete failure of all these efforts in the 1940's has prepared the world for a better understanding of the inconsistency of obligatory neutrality with an effective international law.⁴⁴

7. THE MODERN WORLD ORDER

All people are coming to perceive as President Wilson perceived in 1917 that if international law is to contribute to a moderate assurance of order and justice in the shrinking world, it must rest on the principle that a state which resorts to violence in violation of its legal obligations need not be

⁴¹ Q. Wright, "Present Status of Neutrality," *loc. cit.*, p. 399.

⁴² See this JOURNAL, Vol. 35 (1941), p. 348 ff.

⁴³ House Hearings, "Arming American Merchant Vessels," October, 1941, p. 4.

⁴⁴ Q. Wright, "The Present Status of Neutrality," *loc. cit.*, p. 399 ff.; "International Law and the World Order," in W. H. C. Laves, ed., *The Foundations of a More Stable World Order*, Chicago, 1941, p. 126 ff.

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treated equally with the state that is engaging in violence in defense of the legal order. Analysis of the world situation in the light of changes in military technique, of international communications and of world economy suggests that the conditions which permitted neutrality to be tolerated in the international law of the eighteenth and nineteenth centuries have disappeared. An international law which favors this status departs so radically from the ideas of justice as envisaged by modern democratic and liberal civilization that it will lack all support in public opinion.⁴⁵

International law must advance to a new position based upon the recognition that the whole is greater than the part; that the world community is greater than the state. In doing so, it can gain much inspiration from the international law of Victoria and Grotius, in whose time the medieval tradition of the unity of the world order still prevailed.⁴⁶

But international law must recognize that the present world order is universal. The principles of natural law derived from the theologians, philosophers and jurists of medieval Christendom and classical antiquity, adequate for Victoria and Grotius, must be broadened. The principles of the modern world order must rest on concepts of human equality, individual freedom, scientific proof, and ideological toleration capable of synthesizing great divergences of opinion and belief in a dynamic world.

Furthermore, a viable international law must recognize that the present world order is compact. The reliance upon broad principles and vague procedures which were hardly suitable to maintain the authority of universal Christian ethics over ambitious princes in the post-Renaissance period are wholly inadequate in the present more rapidly changing and more interdependent world. International law must be equipped with procedures objectively to determine the responsibility for violation of its rules and ade-

⁴⁵ Q. Wright, "Effect of the League of Nations Covenant," *American Political Science Review*, November, 1919, Vol. 13, p. 562; "Present Status of Neutrality," *loc. cit.*

⁴⁶ Neutrality has been disparaged by modern internationalists as by medieval jurists because of its destructiveness of the political and moral unity of the world community (T. A. Walker, *A History of the Law of Nations*, Cambridge, 1899, p. 135; Luigi Carnovale, *Only by the Abolition of Neutrality Can Wars Be Quickly and Forever Prevented*, 5th ed., Chicago, 1922, 1st ed., 1917; above notes 18, 39, 44, 45); by some nationalists like Machiavelli because of its inexpediency in the struggle for power (*The Prince*, Chap. 21); by political idealists like Mazzini because of its nullification of moral and political principles (Bolton King, *Mazzini*, p. 305, quoted by G. L. Beer, *The English Speaking Peoples*, New York, 1917, p. 134); and by poets and theologians because it gives evidence of the deadly sin of indolence and slothfulness attributed to the Laodiceans (*Revelation*, Chap. 3, par. 14, 16). Dante was shocked at "that caitiff choir of the angels who were not rebellious, nor were faithful to God, but were for themselves"; neither heaven nor hell would have them, without hope of death, mercy and justice disdained them, all ignored them (*Inferno*, canto 3, lines 37-50). Milton showed his contempt for the fallen Archangel Belial who "with words clothed in reason's garb, counselled ignoble ease and peaceful sloth, not peace" (*Paradise Lost*, II, lines 228-229). To similar effect see Kipling's *Tomlinson*, and Theodore Roosevelt, *America and the World War*, New York, 1915, p. 277.

quately to control the application of sanctions and the modification of rules in changing conditions.⁴⁷

With such procedures, neutrality, instead of dominating international law, may be reduced to the inconspicuous position which champerty, maintenance, and interference with the course of criminal justice (cited as analogies to neutrality) occupy in the common law.⁴⁸

⁴⁷ Harvard Research in International Law, Draft Convention on Aggression, this JOURNAL, Supp., Vol. 33 (1939), p. 871 ff.; Commission to Study the Organization of Peace, Preliminary Report, *International Conciliation*, No. 369, April, 1941, pp. 201, 468 ff.

⁴⁸ T. E. Holland, *Jurisprudence*, 11th ed., London, 1910, p. 399.

PROBLEMS OF INTERNATIONAL LAW IN FRENCH JURISPRUDENCE 1939-1941

BY MARTIN DOMKE

Recent European events have brought with them some interesting questions of international law which have been discussed in French courts, especially during the war. In the following pages some of these decisions will be taken up regarding:

- I. Russian expropriation measures in Eastern Poland, September, 1939.
- II. Claims against owners of goods expropriated by the Spanish Government.
- III. The nationality of corporations.
- IV. The sequestration of enemy property.
- V. Art. 17 of the Armistice Convention between France and Germany (prohibition of the transfer of securities from the occupied zone).

I

With the invasion of Eastern Poland in September, 1939, by Russian troops, oil wells owned by Polish oil companies were seized by the Russian commercial organizations who continued the exploitation. The shares of these Polish companies were nearly one hundred per cent owned by a French corporation known as *Groupe Malopolska*. The President of the Civil Court in Paris allowed this French corporation to attach the debts owed to the Commercial Representation of the Soviet Union by Paris banks to the amount of 75,000,000 francs, which was worth then about \$1,500,000, the amount of the loss the said company claimed to have suffered by the seizure of the property of its affiliated Polish companies.

In a decision of January 12, 1940,¹ the court rejected the allegation of the Commercial Representation of the Soviet Union that the French *Groupe Malopolska* had no right to defend the interests of Polish companies before French courts, all the more because it had always been emphasized, in transactions with Polish authorities, that the owners of the wells were Polish companies. The court alleged that this was justified by the fact that concessions of oil exploitations were only granted to legal entities of Polish nationality and that the legal existence of the Polish companies was only a façade designed to comply with the provisions of Polish law.

The decision is based primarily on the fact that the seizure in question concerned property not situated in Russia, but in Poland. This justified a refusal to recognize expropriation measures. The claim of the *Groupe*

¹ *Représentation commerciale de l'Union des Républiques Socialistes et Soviétiques (U.R.S.S.) c. Société Française Industrielle et Commerciale des Pétroles (Groupe Malopolska)*, Trib. civ. Seine, Jan. 12, 1940, Dalloz Hebd. 1940, 68; Gaz. Pal. 1940, I, 44; Gaz. Trib. No. 14, 29 février 1940; Droit financier, 1940, 56.

Malopolska would have been well founded if that company had succeeded in attaching some of the nationalized property as, for instance, tons of oil drawn from the wells, exported to France and still in the possession of the Commercial Representation or other agents of the Russian Government.² But a claim for damages against a foreign sovereign is quite another thing, since the sovereign enjoys immunity from jurisdiction of the court. The court held that a state ought not to be allowed to allege its immunity when acting in execution of its monopoly of commerce, such measures not being a legitimate exercise of sovereignty. The court relied on the precedents according to which state immunity does not cover the commercial transactions of a state. This rule is indeed well established by French courts and especially by the *Cour de Cassation*.³ Thus, in the *Chaliapine* case,⁴ the *Cour de*

² This question was discussed, following the Mexican oil expropriation, before different European courts, e.g. "*Petroservice*" *S. A. pour le Commerce et le Transport du Pétrole, Crédit Minier Franco-Roumain S. A. Pétrolifère* c. *Compañía Mexicana de Petróleo "El Aguila,"* Hof s'-Gravenhage, Dec. 4, 1939, Ned. Jur. 1940, n. 27, p. 43; *Banque et Société de Pétrole c. Compañía Mexicana de Petróleo "El Aguila,"* Trib. civ. Havre, Oct. 18, 1939, quoted 41. Bull. Inst. Jur. Int. (1939), p. 65, n. 10 805a. Compare *Eastern States Petroleum Co. Inc. v. Asiatic Petroleum Corp.*, 28 F. Supp. 279 (C.C.S.D. 1939), with note in 52 Harv. L. Rev. (1939), p. 1368.

³ *Société France-Exports c. Représentation commerciale de l'U.R.S.S.*, Cour de Cassation, Req., Feb. 19, 1929, Dalloz Hebd. 1929, I, 73; 24 Rev. dr. int. (1929), 266.

There are, however, still doubts as to the extension of this rule to immunity from execution. See:

(a) *Société commerciale, industrielle et financière pour la Russie et les pays limitrophes (Socifros)* c. *U.R.S.S.*, Cour d'appel, Aix-en-Provence, Nov. 23, 1938, Dalloz Pér. 1939, II, 65; 34 Rev. crit. dr. int. (1939), 306;

(b) *Oficina del Aceite c. Domenech*, Cour d'appel, Aix-en-Provence, Dec. 9, 1938, Dalloz Pér. 1939, II, 70; 66 Jour. dr. int. (1939), 596;

(c) *État Espagnol et Compañía Arrendataria del Monopolio de Petróleos c. Bauer Marchal et Cie.*, Trib. comm., Marseille, April 3, 1939, 116 Jour. Jurispr. Comm. et Mar. (1939), 186; 52 Bull. Inst. Jur. Int. (1940), p. 82, n. 11 035.

(d) *Agel c. État Français et État Espagnol*, Trib. civ. Perpignan, April 7, 1939, Juris-Classeurs, 1939, Pér. 1209; 6 Nouv. Rev. dr. int. privé (1939), 453.

For a further discussion see Lemonon, *Rapport (du 24 mai 1938 à l'Institut de droit international) sur l'immunité de juridiction et d'exécution forcée des États étrangers*, 6 Nouv. Rev. dr. int. privé (1939), p. 552; Hackworth, *Digest of International Law*, Vol. 2 (1941), § 169, p. 393; note, "Immunity from Suit of Foreign Instrumentalities and Obligations," 50 Yale L. J. (1941), p. 1088; Wright, "International Law and the Totalitarian States," 35 Am. Pol. Sci. Rev. (1941), pp. 738, 740; Fox, "Competence of Courts in regard to Non-Sovereign Acts of Foreign States," this JOURNAL, Vol. 35 (1941), p. 632.

⁴ *Chaliapine c. Représentation commerciale de l'U.R.S.S.*, Cour d'appel, Paris, July 28, 1932, Dalloz Pér. 1934, II, 139; 28 Rev. dr. int. (1933), 671, aff'd by Cour de Cassation, Req., Dec. 15, 1936, Dalloz Pér. 1937, I, 63; 32 Rev. crit. dr. int. (1937), 710; 4 Nouv. Rev. dr. int. privé (1937), 568. In this case the Commercial Representation of the Soviet Union was held responsible for having introduced and sold in France Chaliapine's autobiography printed in Russia without the author's consent. See note, Ch. D. V., "Le statut de la représentation commerciale de l'U.R.S.S. en France," 21 Rev. dr. int. et lég. comp. (1941), 212.

Cassation held that the rule applies not only to contracts but also to torts linked with commercial transactions. In the *Malopolska* case, however, an entirely different question was at issue. Even if the measures do not conform to the principles of international law, they are not to be treated as private acts nor as quasi-torts involving pecuniary responsibility.⁵

The decision blocking an amount of 75,000,000 francs had not been attacked during the whole year 1940. The continued German military occupation and the then friendly relations between Germany and Russia led to another decision of the *Cour d'appel* of Paris, February 12, 1941.⁶ Though reversing the decision of the civil court, the *Cour d'appel* did not abandon the principles invoked by the former. The *Cour d'appel* based its judgment on the argument that the amount asked as damages had not and could not have been precisely assessed, that being strictly necessary for a warrant of attachment in French law (*une créance certaine, liquide et exigible*). The court held that it was impossible to ascertain whether the exploitation of the oil wells in question was an act of the state sovereign or of the state merchant, as long as no international treaties settled the situation, and that, for the moment, the claim of the French *Groupe Malopolska* did not have the character of certainty required by French law.⁷

II

Before the outbreak of the present war, foreign expropriatory measures caused by the events of the Spanish Civil War were discussed in French courts, especially before the *Cour de Cassation*, which then upheld the principle of protection of individual rights.

The two principal lawsuits were brought by the *Société Anonyme Potasas Ibericas*, a French potash mining corporation with domicile in Barcelona but administration in Paris. Out of 60,000 shares, 42,350 belonged to French nationals, among them the French State, or to Swiss nationals; 9

⁵ "Thus profiting, without compensation, from the property of others which the Russian commercial organizations took possession of momentarily, they have at least committed a quasi-tort involving their pecuniary responsibility."

Invoking French public policy, *Jellinek v. Lévy*, Trib. com., Paris, Jan. 18, 1940, *Gaz. Pal.* 1940, I, 188, upheld a claim against a French debtor presented by the former owners of a Czech firm taken over by a commissioner appointed by the German authorities. The court pointed out: "It is indisputable that among the principles doing honor to French law there are, on one side, the prohibition of proceeding to any expropriation except in the public interest and under condition of an adequate and previous compensation, and, on the other side, the recognition of the equality of the rights of citizens without any discrimination of origin, race and religion." Some months later, this French public policy was fundamentally changed by new legislation introduced by the decree of Oct. 3, 1940, *portant statut des juifs* (*Journ. Off.*, Oct. 18, 1940, p. 5323). See Perreau, "Le nouveau statut des juifs en France," *Juris-Classeurs Pér. Études*, 216, 15 *Semaine Juridique* (1941), No. 37.

⁶ *Cour d'appel*, Paris, Feb. 12, 1941, *Gaz. Pal.* 1941, I, 139.

⁷ Both judgments do not make clear if Russia asserted a title to the oil wells or merely the right of a military occupant to use them during the occupation. The judgments characterize the seizure by the term "appréhension."

out of the 12 directors were French. Like others, the foreign managers of this corporation left Barcelona upon the outbreak of the Spanish Civil War at the end of July, 1936. All business transactions ceased. The *Generalidad* of the autonomous territory of Catalonia by a decree of August 8, 1936, summoned the managers of all companies to return to Barcelona by August 15, 1936, and to resume their activity on penalty of dispossession. In application of a further decree of August 21, 1936, the mines of the *Potasas Ibericas* corporation were seized and exploited by the *Generalidad*. The potash sent to France for sale was not carried as property of the *Generalidad*, the bills of lading bearing the name of private persons. The litigation was thus between the *Potasas Ibericas*, on one side, and the holders of the bills, on the other. *S. A. Potasas Ibericas* alleged that expropriations without indemnity are not recognized in France. This principle was laid down by the French *Cour de Cassation* in the *Ropit* case.⁸

The situation, however, was not quite the same. In the *Ropit* case, the Russian Government had claimed the release of ships owned by that nationalized company, *Ropit*. The ships had fled, on the approach of the Red troops, from Odessa to France, where they were seized by the shareholders and creditors of the *Ropit* residing in France. The Russian Government had never been in possession of the ships; moreover, that government was not recognized by France until long after the ships arrived at Bordeaux. In the *Potasas Ibericas* cases, however, the expropriation measure had been enacted by the competent Spanish authorities recognized by France—the competence of the *Generalidad* under Spanish law had not been contested—and these measures concerned goods situated in Spain. Moreover, the said measures could not be considered as resulting from a general confiscatory policy but merely as emergency measures in a civil war. Even an indemnity was promised though not paid. The present possessors of the goods were neither the *Generalidad*, nor the Spanish Government, but the holders of bills of lading who sought to be treated as holders in good faith. Finally, the argument was presented that the corporation had its administrative center in Spain, was governed by Spanish law and, hence, had no right to complain about expropriatory measures of its own sovereign. For all these reasons, the *Cour d'appel* of Montpellier rejected the claim in a judgment of November 24, 1937. This judgment was reversed by the *Cour de Cassation* on March 3, 1939.⁹

The *Cour de Cassation* held that no expropriation should be recognized in

⁸ *L'État Russe c. Bourgeois ex qual. d'administrateur de la Société en navigation russe dite "La Ropit"*, *Cour de Cassation*, Req., March 5, 1928, *Dalloz Pér.* 1928, I, 81; 24 *Rev. dr. int.* (1929), 298. Compare Borchard, "Confiscation: Extraterritorial and Domestic," this *JOURNAL*, Vol. 31 (1937), pp. 675, 677.

⁹ *S. A. Potasas Ibéricas c. Nathan Bloch*, *Cour de Cassation*, Civ., March 14, 1939, *Dalloz Hebd.*, 1939, 257; *Gaz. Pal.* 1939, I, 726; 66 *Journ. dr. int.* (1939), 615; 34 *Rev. crit. dr. int.* (1939), 280; 6 *Nouv. Rev. dr. int. privé* (1939), 163.

France unless it is in the interest of public welfare and unless adequate compensation be provided.¹⁰ The promise of an indemnity by the Spanish Government was held irrelevant, as it was given at a time when the goods were already in France. The court held that the foreign legislator has no power to give an extraterritorial effect to expropriation measures by adding a promise of indemnification after the goods have left his territory. This is a very interesting extension of the *lex rei sitae* rule.¹¹ In consequence of the non-recognition, the expropriated owner is entitled to claim the delivery of the goods if he finds them in France; this relief would also be given if he found them in a third country which does not recognize the expropriation.¹² This rule is, however, subject to qualification if a third party acquires the goods, as in the case decided by the *Cour de Cassation*. The court did not sacrifice the rights of the purchaser. It remanded the case to the *Cour d'appel* of Nîmes in order to ascertain whether the defendant acquired the potash in good faith and for value, or whether he was an agent or straw-man of the expropriating government. While the *Cour d'appel* of Montpellier had affirmed that the holder of a bill of lading is to be presumed to be in fact the owner, the *Cour de Cassation* replied that, under the circumstances of the case, the possession of the bill of lading was not conclusive. If the defendant proved that he bought the potash from the Spanish authorities while it was still in Spain, he would be the holder in due course and therefore entitled not only to an amount corresponding to the sum he spent for it,¹³ but, moreover, to be considered as the legitimate owner. In this case, respect for the *lex situs* prevails over the protection of the former (plaintiff) owner's rights.

Eleven days later, on March 25, 1939, the *Cour d'appel* of Aix-en-Provence rendered a similar judgment,¹⁴ reversing a decision of the Commercial Court

¹⁰ As to the question of an "adequate, effective and prompt payment for the properties seized," see the note of Secretary Hull to the Mexican Government of Aug. 22, 1938 (this JOURNAL, Supp., Vol. 32 (1938), p. 191); the articles of C. C. Hyde: "Confiscatory Expropriation," this JOURNAL, Vol. 32 (1938), p. 759, and "Compensation for Expropriation," *loc. cit.*, Vol. 33 (1939), p. 108; Eagleton, "International Law and Public Order," *loc. cit.*, Vol. 33 (1939), p. 545; the address of Professor Borchard and discussion following, Proceedings of American Society of International Law, 1939, p. 51; Herz, "Expropriation of Foreign Property," this JOURNAL, Vol. 34 (1940), pp. 242, 255.

¹¹ As to movables, the *lex rei sitae* rule was definitely established in France in *Kanloor de Maas c. Bez*, Cour de Cassation, Req., March 24, 1933, Dalloz Hebd. 1933, 378.

¹² See *supra*, note 2.

¹³ If the potash had been considered simply as stolen goods, this would be the solution under Art. 2280, Sec. 1, French Civil Code, which provides that if the actual possessor of stolen goods bought it in a market or from a merchant selling goods of the same kind, the original owner has no right to ask for restitution unless he reimburses the possessor for the price he paid.

¹⁴ *Volatron et Soc. à resp. lim. Centre d'expansion commerciale internationale c. Moulin ès qualité d'administrateur judiciaire de la Société Potasas Ibéricas*, Cour d'appel, Aix-en-Provence, March 25, 1939, Dalloz Hebd. 1939, 329.

of Marseille of May 25, 1937.¹⁵ In this latter decision the Spanish nationality of the corporation was contested, but this line of argument was, for good reasons (see *infra*, III), not referred to by the *Cour d'appel* of Aix-en-Provence.

III

On the Continent, and especially in France, the capacity of corporations is determined by the *lex patriae*; but in fact the *lex domicilii* obtains, as the nationality of legal persons is determined by the *situs* of the principal office, the administrative center.¹⁶ This differs from the common law rule, under which the law of the country which confers the legal personality is competent.¹⁷ But the administrative center rule has been modified in France by the control theory. During the war of 1914–1918, the determination of nationality by the administrative center criterion alone proved unsatisfactory, since many corporations domiciled in France were composed of enemies or were at least under their influence. In order to apply sequestration of enemy property to these corporations they were declared enemies.¹⁸

This principle was applied in the strictly limited field of the special war situation; but after the war learned authors recommended extension of the control criterion to all cases where a statute or treaty made a distinction between French and foreign corporations, and where the question at issue was not whether the French or another law governs the corporation, but whether

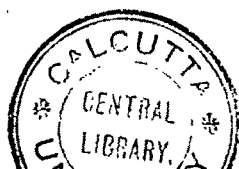
¹⁵ *Moulin vs. qual. c. Volatron*, Trib. comm., Marseille, May 25, 1937, Sirey, 1938, II, 105; 33 Rev. crit. dr. int. (1938), 71; 64 Journ. dr. int. privé (1937), 535; 6 Nouv. Rev. dr. int. privé (1939), 457.

¹⁶ The administrative center criterion prevails over the exploitation center criterion since the decision of the Cour de Cassation, Civ., June 20, 1870, Dalloz Pér. 1870, I, 416. It was recognized even in the decisions concerning war damages which discarded it in this special field: *Soc. Rozendaal*, Cour de Cassation, Civ., July 25, 1933, Dalloz Pér. 1936, I, 121; 29 Rev. crit. dr. int. (1934), 109; *Soc. Oschwald & Cie*, Cour de Cassation, Civ., May 29, 1937, Dalloz Pér. 1937, I, 64; 4 Nouv. Rev. dr. int. (1937), 603.

A recent French act (*loi relative aux sociétés anonymes*) of Nov. 16, 1940 (Journ. Off., Nov. 26, 1940, p. 5828, Rectificatif Journ. Off., Nov. 27, 1940, p. 5846), follows the "siège social" theory by expressly providing (Art. 5, par. 6) for its application to corporations having their administrative center in France but their exploitation in other countries. These questions are set out in the writer's article "Le problème de la nationalité des sociétés avant et après la législation et la jurisprudence française de guerre de 1939–1940," 8 Nouv. Rev. dr. int. privé (1941), Nos. 1–2.

¹⁷ Farnsworth, *The Residence and Domicil of Corporations* (1939), pp. 42, 255.

¹⁸ The leading case is *Société franco-suisse Conserve de Lensbourg*, Cour de Cassation, Reg., July 20, 1915, Dalloz Pér. 1916, I, 44; Sirey, 1916, I, 148; 42 Journ. dr. int. (1915), 1164. The control theory was referred to in the Peace Treaties of Versailles, Art. 297b; St. Germain, Art. 249; Trianon, Art. 232. See *supra*, note 16 and, for further discussion: Garner, *International Law and the World War* (1920), Vol. 1, § 152, p. 223; Oppenheim, *International Law*, Vol. 2 (6th ed. by Lauterpacht, 1940), § 88e, p. 222; Gathings, *International Law and American Treatment of Alien Enemy Property* (1940), 48.



the latter enjoys the rights granted only to French corporations.¹⁹ In the field of war damage compensation and, especially, in that of *propriété commerciale*, i.e., the right of a merchant to a prolongation of the lease of his business premises, some decisions followed this tendency by refusing such rights to corporations which had their administrative center in France, on the ground of the foreign nationality of their managers and shareholders. The most famous are the *Singer* and the *Remington* cases which excluded French corporations controlled by Americans from the benefit of the legislation concerning *propriété commerciale*.²⁰

At the beginning of the war of 1939, special decrees were issued by the French Government providing for the sequestration of property of companies controlled by enemies.²¹ The generalization of the control theory was, however, rejected by the *Cour de Cassation*, on January 9, 1940.²² The *Cave Coopérative Vinicole de Rauzan*, a wine-growers' coöperative, had advertised works to be carried out for it. Though it was specified that the contractor ought to be French, the offer of a partnership composed of Italian nationals, the *Société Graziana*, was preferred to that of a French company.

¹⁹ Comp. Niboyet, *Traité de droit international privé français*, Vol. II (1938), No. 730. See also Maury, "Nationalité et conditions des étrangers," 58 *Rev. crit. légial. et jurispr.* (1938), 103; Chauveau, "Les abus de la notion de personnalité morale des sociétés," 1 *Rev. gén. dr. comm.* (1938), 397; Savatier, "La condition, en droit international privé, des personnes morales dans les divers décrets-lois français de 1939," 34 *Rev. crit. dr. int.* (1939), 418.

²⁰ *Lanco c. Soc. Singer*, *Cour d'appel*, Rennes, June 16, 1930, *Dalloz Pér.* 1931, II, 9; 58 *Journ. dr. int.* (1931), 1099; *Soc. Remington Typewriter*, *Cour de Cassation*, Req., May 12, 1931, *Dalloz Pér.* 1936, I, 121; 27 *Rev. dr. int.* (1932), 129.

²¹ Trading with the Enemy Act of Sept. 1, 1939 (*Décret-loi relatif aux interdictions et restrictions des rapports avec les ennemis et les personnes se trouvant sur le territoire ennemi ou occupé par l'ennemi*, *Journ. Off.* Sept. 4, 1939, p. 11087); executive decree of the same day (*ibid.*, p. 11089), Art. 1, Sec. 2; and decree concerning the declaration and sequestration of enemy-owned property of the same day (*décret-loi concernant la déclaration et mise sous séquestre des biens appartenant à des ennemis*, *ibid.*, p. 11091), Art. 2, Sec. 2.

For the recent development of this question in English war legislation—Trading with the Enemy Act, 1939 (2 & 3 Geo. VI, Ch. 89), Sec. 2—see Parry, "The Trading with the Enemy Act and the Definition of an Enemy," 4 *Mod. L. Rev.* (1941), 161, 165. As to German war legislation—decree on the Administration of Enemy Property (*Verordnung über die Behandlung feindlichen Vermögens*), Jan. 15, 1940 (*Reichsgesetzblatt*, I, 191), and executive ordinance (*Ausführungsverordnung*) June 20, 1940 (*Deutscher Reichsanzeiger*, Nr. 144)—see the articles by Möhring, 10 *Deutsches Recht* (1940), A 1607, and 7 *Zeitschrift der Akademie für deutsches Recht* (1940), 125; Hefermehl, *ibid.*, p. 239; Krieger, 39 *Bank-Archiv* (1940), 93. The property owned by citizens of enemy countries as well as by persons and corporations "having their residence or normal place of abode in the territory of an enemy country" is administered by a custodian, instituted by the decree relating to custodianship *in absentia* (*Verordnung über die Abwesenheitspflegschaft*), Oct. 11, 1939 (*Reichsgesetzblatt*, I, 2026), with three executive ordinances Oct. 18, 1939 (2056), Jan. 22, 1940 (232), and May 30, 1940 (821), translation in "German Decrees Concerning Curatorship in Absence for enemy-owned property," 3 *Comparative Law Series* (1940), 385.

²² *Etablissements Villa c. Cave Coopérative Vinicole de Rauzan*, *Cour de Cassation*, Req., Jan. 9, 1940, *Juris-Classeurs*, 1940, *Pér.* 1473; *Gaz. Trib.* No. 25; *Gaz. Pal.* 1940, I, 225.

The claim of the latter, *Etablissements Villa*, was rejected on the ground "that a partnership is rightly considered as French, whatever may be the nationality of the partners, provided it was formed in France under French law and has its administration center in France."

A similar point of view was expressed more recently in a decision of the *Tribunal civil* of Dieppe, March 5, 1941.²³ A French limited company, owner of a trawler, was formed by two Belgians; the customs authorities did not consider the ship as a French one within the terms of Article 334, *Code douanier*.²⁴ The court held—without reference to the decision of the *Cour de Cassation* mentioned above, note 22—that the ship was French as it was used by a company which was formed according to French law and domiciled as well as carrying on its fishing trade at Dieppe, France. The ship was therefore exempted from certain customs duties.

Nevertheless, the war has given rise to some decisions applying the control theory. A French Act of September 26, 1939, grants tenants various forms of relief during the war; the court may reduce the rent, rescind or prolong the lease against the landlord's will.²⁵ All these advantages are denied to foreigners, with exemption to those fighting in French or allied armies. The courts construe the provision very strictly, refusing to extend the Act even to citizens of nations protected by international treaties providing for assimilation to the nationals of the country or a most-favored-nation clause.²⁶

Two judgments particularly concern French companies controlled by foreigners. In the first case, the *Tribunal civil de la Seine*, January 15, 1941,²⁷ did not recognize as French a company the capital of which belonged almost entirely to an Italian domiciled in Italy who had entrusted the management to a relative domiciled in France but also of Italian nationality.

The second case concerns the branch of an American film producer and

²³ *Soc. Normande de Chalutiers à Moteurs c. Administration des Douanes*, Trib. civ., Dieppe, March 5, 1941, *Gaz. Pal.* 1941, I, 368.

²⁴ This article runs as follows: "No vessel is considered French nor has the rights of French vessels if it is not half owned by Frenchmen."

²⁵ *Décret réglant les rapports entre bailleurs et locataires en temps de guerre*, Sept. 26, 1939 (*Journ. Off.*, Oct. 5, 1939, p. 12024), amended by decree of June 1, 1940 (*Journ. Off.*, June 2, 1940, p. 4136).

²⁶ Thus, the benefits of the decree were denied to a Belgian corporation: *Compagnie Internationale des Wagons-Lits c. Société des Hôtels Réunis*, Cour d'appel, Paris, Oct. 29, 1940, *Gaz. Pal.* 1940, II, 121; and to a Belgian national living in Paris who had no possibility of joining the Belgian army: Trib. civ. Seine, Nov. 14, 1940, *Dalloz Analytique Hebdomadaire*, 1941, *Jurisprudence*, p. 60; and to a Russian refugee without nationality invoking in vain the Geneva Convention of Oct. 28, 1933, granting these refugees assimilation to the nationals of the country of residence: *Gilon c. Chmoulovsky*, Cour d'appel, Paris, Nov. 18, 1940, *Dalloz An.* 1941, 46; and to a foreigner engaged in a "prestataires" unit (labor corps), Trib. civ. Seine, Dec. 2, 1940, *Dalloz An.* 1941, 63.

²⁷ Trib. civ. Seine, Jan. 15, 1941, *Juris-Classeurs*, 1941, *Pér.* 1632; *Gaz. Pal.* 1941, I, 236.

distributor.²⁸ This branch, organized in the form of a French joint stock company, asked for a reduction of the rent of its premises at Lille, relying on the diminution of its income on account of the war, and for the rescission of the lease as from December 31, 1940. The court pointed out that 13,500 out of the 14,000 shares belonged to the mother company, that its directors as well as its accountants were either American nationals or French agents of the American company, and that the French company's object was an "exploitation of international character," the company being designed for distributing American pictures not only in France but also in Belgium where the French company had a branch. This argument is not convincing as it was obvious that the principal center and the head office were in France. But the court relied primarily on the nationality of the principal shareholders, the directors and accountants, holding that these characteristics deserve special consideration in connection with the emergency legislation, the benefits of which are expressly reserved to French nationals and foreigners fighting for France.

This attitude of the courts is understandable, though doubtful with respect to its compatibility with municipal and international law. As to the former, there is no provision in the decree of September 26, 1939, defining the French nationality of corporations, and one cannot see any legal basis for disregarding the general criterion of the administrative center.²⁹ As to the above-mentioned precedents concerning *propriété commerciale*—the Singer and Remington cases (note 20)—they are themselves highly questionable and perhaps overruled by the judgment of the *Cour de Cassation* of January 9, 1940, in the Graziana case (note 22).³⁰ Under the international law aspect, it may be regretted that the courts construe an Act

²⁸ *Soc. Universal Film c. Soc. Dubost*, Trib. civ. Lille, Feb. 8, 1941, Sirey, 1941, II, 21; Gaz. Pal. 1941, I, 236.

²⁹ Trib. civ. Seine, Nov. 16, 1939, 23 *Revue des Loyers* (1940), 215, admitted a claim of a French company to the benefits of the decree, although the director was an American citizen, but the manager was a Frenchman. Likewise the court referred to the "siège social" criterion in a case decided Feb. 13, 1941, Gaz. Pal. June 1-3, 1941, nos. 152-4, p. 3, footnote, concerning a limited company, half the shares of which belonged to a Swiss national. However, a decision of April 7, 1941, *ibid.*, p. 2, proceeded anew on the basis of the control theory and required evidence as to the nationality of the company's shareholders and directors.

³⁰ For a discussion of cases concerning the nationality of corporations in this country, see Norem, "Determination of Enemy Character of Corporations," this JOURNAL, Vol. 24 (1930), p. 310; Woolsey, "Litigation of the Sabotage Claims against Germany," this JOURNAL, Vol. 35 (1941), pp. 282, 299; Gathings, *op. cit.*, p. 60. As to an administrative interpretation of this question, see note, "Foreign Funds' Control Through Presidential Freezing Orders," 51 Col. Law Rev. (1941), pp. 1039, 1045; Harris and Joseph, *Present Problems Concerning Foreign Funds Control* (1941), 10; Thiesing, *Control of Foreign-Owned Property in the United States* (1941), 16; Davis, "Federal Freezing Orders—a Transition Period," N. Y. L. J., Sept. 26, 1941, col. 766; cf. Kuhn, "Foreign Funds Control and Foreign-Owned Property," this JOURNAL, Vol. 35 (1941), 651, *ibid.*, Supp., 214.

in such a way as to infringe upon the clauses of international treaties purporting to protect foreigners against discrimination.³¹

IV

The aforementioned decrees of September 1, 1939, concerning trading with the enemy and sequestration of enemy property (note 21) show that the concept of nationality is inadequate even in this field of war legislation. It is to be supplied by the residence and the control theory. With good reason, both decrees define German nationals as enemies, provided, however, that they have their present or usual residence in Germany. Only under special conditions (internment in concentration camps in French territories, dependence upon persons reputed to be enemies), are other German nationals deemed to be enemies within the meaning of the decrees.³²

The construction of these articles was the subject-matter of four decisions of the *Tribunal civil de la Seine* concerning companies controlled by German nationals. In the first case³³ the sequestration order was revoked, evidence being produced that the German holder of a substantial part of the shares (2000 of 2500) resided in a neutral country, Holland, and was not on the official "Blacklist."³⁴ In the second case³⁵ the sequestration was maintained, two of the three managers being German nationals who had left France at the beginning of the war. In the third case³⁶ the sequestration order was revoked with regard to the company although three

³¹ The same problem came up with respect to the Act of June 30, 1926, concerning "propriété commerciale." The courts held that only a disposition in a treaty expressly providing for that question prevails over the municipal law in accordance with the rule that it must be construed in case of doubt as not conflicting with the state's international obligations. This view was adopted in *Zumkeller* (a Swiss national) c. *Florence et Peillon*, Cour de Cassation, Civ., Feb. 4, 1936, *Dalloz Hebd.* 1936, 145, and *Grigorakis* (a Greek national) c. *Montès*, Cour de Cassation, Civ., Feb. 3, 1941, *Dalloz An.* 1941, 100.

³² The decrees (*supra*, n. 21) were repealed after the Armistice by a decree of July 28, 1940, *Journ. Off.*, July 29, 1940, p. 4590. Already before this date, June 21, 1940, the German military authorities of the Paris region had formally rescinded all measures formerly taken by French authorities "contre les biens, droits et intérêts des ressortissants allemands dans le territoire sous les ordres du Militärbefehlshaber Paris" (*Journ. Off. des ordonnances du Gouverneur militaire de la région de Paris*, June 21, 1940); see also the application decree of July 12, 1940, *Journ. Off. des ordonnances*, July 12, 1940, both in *Législation de l'occupation* (published by *Gazette du Palais* in Paris), Vol. 1 (1940), pp. 33, 51.

³³ *S. A. Les Parfums Tosca*, Trib. civ. Seine, Nov. 16, 1939, *Dalloz Hebd.*, 1940, 11; *Gaz. Pal.* 1939, II, 306; quoted in C. C. H. War Law Series, Foreign Supplement, ¶66,035.

³⁴ The French Ministry of Foreign Affairs has published several blacklists of individuals and corporations resident in neutral countries (*Journ. Off.*, Sept. 4, 1939, p. 11093) which are deemed to be under German influence and therefore to be treated as enemies (*Liste officielle des maisons considérées comme ennemis ou comme prenant vis-à-vis de l'ennemi le rôle de personnes interposées et résidant dans les pays neutres*).

³⁵ *Soc. Somatez*, Trib. civ. Seine, Nov. 3, 1939, *Dalloz Hebd.*, 1940, 22; *Gaz. Pal.* 1939, II, 338.

³⁶ *Soc. Le Zénith*, Trib. civ. Seine, Jan. 3, 1940, *Dalloz Hebd.*, 1940, 35; *Gaz. Pal.* 1940, I, 78.

out of four partners were German nationals, on the ground that two of them were authorized to live in France as refugees; the situation of the third was not yet settled and therefore the sequestration was maintained only with regard to his part. In the fourth case,³⁷ the sequestration ordered on the ground that the company depended on an Austrian firm, was not upheld after evidence was given that the two Austrians in question had left Austria after the German occupation, one of them living in Montreal, the other in New York.

V

By the Armistice Convention between France and Germany signed June 22, 1940,³⁸ France was divided in two areas, the French Government being bound (Article 17) to prevent any transfer of economic assets ("*wirtschaftliche Werte und Vorräte*") from the occupied to the non-occupied territory or abroad. The property situated in the occupied territory cannot be disposed of without the consent of the German authorities. This Article 17 had severe consequences for the thousands of French and foreign refugees living in the non-occupied zone, who had left all their goods and particularly their bank deposits in the occupied zone.³⁹ Some banks having at the beginning of the German offensive carried the money and securities deposited with their eastern and northern agencies to the southern districts, depositors brought lawsuits against the branch offices in the unoccupied zone. The banks relied on a decree of the German authorities⁴⁰ blocking all accounts

³⁷ *Spielman, Herman et Spielman, Ernst*, Trib. civ. Seine, March 7, 1940, Gaz. Pal. 1940, I, 370.

³⁸ See this JOURNAL, Vol. 34 (1940), Supp., p. 173. The armistice convention is written in German (text in: 24 *Zeitschrift für Völkerrecht* (1940), p. 321); French translations in different terms were published by a few newspapers in June, 1940. The French Government did not publish the text. Moreover, difficulties of translation of German decrees into French were probably the reason for an ordinance issued some months after the occupation, Oct. 2, 1940, providing in the only existing article that for the application of ordinances and regulations issued by the services of the military administration in France, the German text will be the official one ("*ne fera foi que le texte allemand*"). *Ordonnance des autorités militaires allemandes concernant la valeur légale du texte allemand des ordonnances et arrêtés émis par l'administration militaire* (Journ. Off. des ordonnances du Gouverneur militaire pour les territoires français occupés, Oct. 17, 1940; *Législation de l'occupation*, Vol. II (1940), p. 38).

³⁹ By French-German agreements of May 7, 1941 (see New York Times, May 8, 1941, p. 3, col. 1), the transfer of goods, cash and securities from the occupied to the non-occupied zone was authorized, with some qualifications, but no abrogation of the regulation instituted by Art. 17 of the Armistice Convention was ever realized.

⁴⁰ *Ordonnance des autorités militaires allemandes concernant l'exportation et l'importation pour les territoires occupés des Pays-Bas, de la Belgique, du Luxembourg et de la France* of May 23, 1940 (Journ. Off. des ordonnances du Gouverneur militaire pour les territoires français occupés, July 4, 1940) and *Ordonnance des autorités militaires allemandes relative à l'établissement d'un office de surveillance des banques* (*Bankenaufsichtsamt*, office for control of banks) dans le territoire français occupé of July 22, 1940 (*ibid.*, July 26, 1940), both in *Législation de l'occupation*, Vol. 1 (1940), pp. 19, 76.

listed in the bank books regardless of whether these assets were in fact in the occupied territory or not. Courts declared themselves incompetent *rationae materiae*, as the interpretation of treaties belongs to the sphere of (French) governmental authorities.⁴¹ But in some cases they gave judgment for the plaintiffs. The *Cour d'appel* of Limoges⁴² granted a provisional attachment to a petitioner who proved that his current bank account, on his demand, was regularly transferred to the unoccupied zone before the armistice. The same court⁴³ held the *Banque rurale de Strasbourg* liable to restore securities to the depositor as evidence was given that by order of the French Government even the administrative center of this bank had been transferred to Périgueux (now unoccupied zone), and that the securities were hence not only *de facto* but also *de jure* in the unoccupied territory.

The general problem raised by these cases is that of the *situs* of securities and other choses in action. It is generally held by French courts that the *situs* of debts is at the debtor's domicile.⁴⁴ But if the debtor is a firm with

⁴¹ *Bloch c. Crédit Lyonnais*, Trib. civ. Pau, Sept. 21, 1940, concerning securities deposited with the agency at Orléans and transferred to Pau, *Juris-Classeurs*, 1940, Pér. 1544; *Tricotages Mécaniques Alsaciens c. Crédit Commercial de France*, Trib. civ. Limoges, Sept. 27, 1940, concerning securities deposited with the agency of Mulhouse, *Juris-Classeurs*, 1940, Pér. 1561; *Soc. des Tubes c. Soc. Générale Alsacienne de Banque*, Cour d'appel, Limoges, Nov. 11, 1940, concerning a current account with the agency at Haguenau, *Juris-Classeurs*, 1940, Pér. 1561; *Sté. Heimendinger c. Crédit Industriel d'Alsace et de Lorraine, Société Lévy Fils c. same*, Cour d'appel, Lyon, March 26, 1941, *Rec. des Sommaires de la Jurisprudence Française*, 1941, Nos. 406/7.

In the same sense, in *Navire Tibore*, Cour de Cassation, Civ., Dec. 18, 1939, *Gaz. Pal.* 1940, I, 131; 18 *Rev. dr. marit. comp.*, Supp. (1940), 35, rejected a claim for compensation of a Hungarian ship-owner whose ship had been commandeered by the French Government in 1914, holding itself incompetent to interpret Art. 2 of Hague Convention VI of Oct. 18, 1907, relative to the status of enemy-merchant ships upon the outbreak of hostilities. See Oppenheim, *op. cit.*, p. 286; Colombos, *Treatise on the Law of Prize* (2nd ed. 1940), p. 122.

⁴² *Les Fils de Mme. Veuve Samuel c. Soc. Générale Alsacienne de Banque*, Cour d'appel, Limoges, Nov. 11, 1940, *Juris-Classeurs*, 1940, Pér. 1561.

⁴³ *Ebstein c. Banque Rurale de Strasbourg*, Cour d'appel, Limoges, Dec. 16, 1940, *Juris-Classeurs*, 1940, Pér. 1584; 23 *Répertoire Commaille* (1941), No. 15, p. 231.

⁴⁴ This question of the *lex rei sitae* is of wide importance; see *Sinder c. Menter, Kransen et Spruyt*, Cour d'appel, Paris, Nov. 18, 1927, *Dalloz Hebd.* 1928, 91, holding that an assignment made in Turkey between Belgians has no effect against the debtor domiciled in France unless the requirements of French law are fulfilled. In *Cie. Française de Navigation Cyprien-Fabre c. Banque Privée*, Cour de Cassation, Civ., May 12, 1931, *Dalloz Pér.* 1933, I, 60, held that an attachment in New York ought not be scrutinized by a French court regardless of the French nationality and domicile of both parties, each state being sovereign in its own territory. In the same sense *Sté. d'assurances La Union et le Phénix espagnol c. S. A. John Cockerill et Vacher*, Cour de Cassation, Req., July 4, 1933, *Dalloz Pér.* 1934, I, 10, 13; 12 *Rev. dr. mar. comp.*, Supp. (1934), p. 2, granted the creditor of a nationalized Russian corporation (*Sté. russe des Transports*) the right to attach a debt owed to it by a debtor domiciled in France. For a discussion of this question in American law, compare note, "Extra-territorial Effect of Foreign Decrees and Seizures," 88 *U. of Pa. L. Rev.* (1940), 983.

different branches, the question arises whether the place of the head office or the place of the interested branch is decisive. The question is far from settled. It is noteworthy that French exchange restrictions consider French branches of foreign companies as inland residents and foreign branches of French companies as foreigners; the *situs* of the branch is hence conclusive for the management of the debt.⁴⁵ Personal claims relating to specific property, for instance, deposited securities, are often considered as situated at the *situs* of the property.⁴⁶ In this sense French courts in the litigations concerning the restitution of assets (notes 42 and 43) did not consider the German construction of the said Article 17 of the Armistice Convention as conclusive.

⁴⁵ See decree of April 24, 1940, Arts. 3, 4, 5 (Journ. Off., May 2, 1940, p. 3206), as amended May 20, 1940 (Journ. Off., May 21, 1940), translation in C. C. H. War Law Series, Foreign Supplement, ¶67, 101-67, 103, with the regulation of April 30, 1940, regarding transactions prohibited and authorized, Art. 1, par. 5 (Journ. Off., May 2, 1940, p. 3212), as amended May 27, 1940 (Journ. Off., May 28, 1940), and Oct. 10, 1940 (Journ. Off., Oct. 24, 1940), translation *ibid.*, 67618. For further details see the writer's article cited in note 16.

⁴⁶ For this reason, the above-mentioned judgments concerning securities deposits (n. 41) are criticized by Maupas "L'article 17 de la convention franco-allemande d'armistice," 23 Répertoire Commaille (1941), I, 25. The author relies on an (unpublished) decision of the Trib. civ. Périgueux, Dec. 24, 1940, where Art. 17 of the Armistice Convention is held inapplicable not only to an account "dépôt-titres," but also to an account "dépôt-espèces" maintained by the coupons detached from the deposited securities.

STATE IMMUNITY AND THE REQUISITION OF SHIPS DURING THE SPANISH CIVIL WAR

II. BEFORE THE COURTS OF THE UNITED STATES

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In a previous issue of this JOURNAL the writer has discussed the position of the British courts with respect to the cases which arose out of the requisition of merchant ships during the Spanish Civil War.¹ It was there suggested that the decisions in these cases might throw some light upon the legal situation which would possibly be created as a result of the conflicting claims of rival governments, and of dispossessed owners, to ships which were without the national territory at the time their states of registry were occupied by Axis forces. The courts of the United States were not confronted with such a wide range of problems growing out of the Spanish conflict as were those of Great Britain. This was, perhaps, due in large part to the fact that the United States accorded no recognition to the régime of General Franco prior to recognizing it as the *de jure* government of all Spain. Questions relative to the status of an insurgent authority recognized as a local *de facto* government did not, therefore, arise. In one important case, however, legal problems relating to the immunity of foreign public vessels and to the validity of extraterritorial decrees of requisition were fully examined. As Professor Hyde has remarked, the case of *The Navemar* may not have produced a *cause célèbre*,² but the series of adjudications which it inspired have resulted in the most significant contributions to the law concerning the status of foreign public vessels which have been made by the American courts since the period immediately following the close of the World War.³

The Navemar, owned and operated by a Spanish corporation, was in the port of Buenos Aires on October 10, 1936, on which date the Republican Government of Spain issued a decree attaching the vessel and declaring it to be in the national public service. Spanish consular officers in Argentina endorsed the ship's roll and register with the statement that the vessel had

¹ "State Immunity and the Requisition of Ships during the Spanish Civil War: I. Before the British Courts," this JOURNAL, Vol. 35 (1941), pp. 263-281.

² "Concerning the *Navemar*," this JOURNAL, Vol. 33 (1939), p. 530.

³ The decisions of continental European courts are not discussed in the present article since they are adequately treated by Jaenicke, "*Die Frage der Immunität in der Rechtsprechung zum spanischen Bürgerkrieg*," 9 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1939), pp. 354-382; and Stefan A. Riesenfeld, "Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine," 25 *Minnesota Law Review* (1940), p. 62 ff.

become the property of Spain, and permitted it to proceed to New York with a cargo for its time charterers. While *The Navemar* was discharging its cargo at New York, the Spanish Consul General, acting under instructions from the Spanish Ambassador, delivered to the master a letter dated November 28, 1936, reading: "The ship of your command is from this date at the disposition of the government of the Republic. . . ." Shortly thereafter, a committee of the crew took possession of *The Navemar* in the name of the Spanish Government, and their action was ratified by the Consul General, who, on December 7, 1936, appointed a new master to relieve the former of his command. The owner then filed a possessory libel against *The Navemar in rem* and against the committee of the crew *in personam*, alleging that the libelant had been wrongfully deprived of possession of the vessel. On December 16, 1936, a default decree was entered and possession adjudged to the libelant.⁴ The Spanish Consul General sought on behalf of the Ambassador to open the default and vacate the decree, and filed a suggestion alleging that *The Navemar* was a public vessel in the possession of the Republic of Spain, and, therefore, immune from the process of the court. The application was denied, though leave to renew was granted.⁵ The district court denied a new application by the Ambassador to intervene and assert the claims of his Government on the grounds that *The Navemar* was not in the physical possession of the Government of Spain prior to its seizure at New York by members of the crew; that it is contrary to public policy to enforce foreign confiscatory decrees with extraterritorial application; and that state immunity cannot be set up as a bar to jurisdiction where an attempt has been made to seize property within the territorial limits of the United States in violation of the orderly processes of the local law.⁶

An appeal was taken to the Circuit Court of Appeals for the Second Circuit, which reversed the order of the court below with directions to enter an order dismissing the libel.⁷ The court held that the Ambassador's sugges-

⁴ Decision unpublished. When the decree adjudging possession of the vessel to the libelant was read by the chief deputy marshal to the crew, the spokesman for the latter stated that they would not obey any orders excepting those of the Spanish Consul or of the ship's committee, and that they would resist any effort on the part of others to take possession of the vessel. Contempt proceedings were then brought, but the district court denied the motion on the ground that the nature of the alleged contempt was not civil but criminal, and that since the crew had not been ordered by the marshal to leave the vessel, no criminal contempt had been committed. *The Navemar*, *Compañía Española de Navegación Marítima, S. A., v. Crespo, et al.*, 17 F. Supp. 495 (E.D.N.Y. 1936).

⁵ *The Navemar*, 17 F. Supp. 647 (E.D.N.Y. 1936). The failure of the Spanish Ambassador to act earlier is explained by the fact that on being informed of the filing of the libel he had, on December 10, 1936, addressed a note to the Secretary of State requesting that steps be taken to obtain the release of the vessel. Pending the exchange of communications, it was deemed inadvisable by him to appear in the proceedings. The Department of State declined to take the requested action. See p. 42, *infra*.

⁶ *The Navemar*, *Compañía Española de Navegación Marítima, S. A., v. Crespo, et al.*, 18 F. Supp. 153 (E.D.N.Y. 1937).

⁷ *The Navemar*, 90 F. (2d) 673 (C.C.A. 2d, 1937).

tion of immunity was conclusive; that the Spanish Government was in constructive possession of the vessel since the date of the decree; and that this possession was, for purposes of asserting immunity, equivalent to actual or physical possession.⁸ On *certiorari*,⁹ the Supreme Court reversed the decree of the Court of Appeals, but ordered that the Spanish Ambassador be permitted to intervene and assert his Government's ownership and right to possession of the vessel. The suggestion of immunity was not, the court held, conclusive or sufficient as proof of its allegations, and the evidence did not support the claim that *The Navemar* was in the actual possession of the Spanish Government, and, therefore, immune from jurisdiction.¹⁰

Pursuant to this mandate, the Ambassador was permitted to file a special claim and intervention before the district court, which found that the evidence submitted by the intervener failed to support the contention that *The Navemar* had been in the possession of the Spanish Government prior to its entry into the territorial waters of the United States; and that in the absence of actual possession, the right to possession of the vessel by virtue of a decree which was in effect a penal statute could not be successfully asserted in our courts.¹¹

On final appeal to the Circuit Court of Appeals, the order dismissing the intervention was reversed, and possession of *The Navemar* was decreed to the Spanish Consul General at New York.¹² Since the Supreme Court had denied the claim of immunity based upon possession, the court addressed itself to the question of title and right to possession, which alone had been referred back for determination. The effect of the decree, the court held, was to vest the ownership and right to possession of *The Navemar* in the Spanish Government; and whether or not it effected the expropriation while the vessel was in Argentine waters, the decree became operative when the ship reached the high seas.¹³ The proceedings were at last terminated on

⁸ In addition to raising the plea of immunity, the appellant challenged the jurisdiction of the court on the ground that by Art. XXIII of the Treaty of 1902 between the United States and Spain [33 Stat. 2106, 2116], matters relating to the "internal order of merchant vessels" and to "differences which may arise either at sea or in port between captains, officers and crews," are placed within the exclusive cognizance of the consuls of the respective nations. This ground was dismissed with the observation that the issue was one of title or ownership and not the mere settlement or adjustment of internal differences on the vessel. 90 F. (2d) 673, 676. ⁹ 302 U. S. 669 (1937).

¹⁰ *Compañía Española de Navegación Marítima, S. A., v. The Navemar, et al.*, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 516 (1938); this JOURNAL, Vol. 32 (1938), p. 381.

¹¹ *The Navemar*, 24 F. Supp. 495 (E.D.N.Y. 1938).

¹² *The Navemar, Compañía Española de Navegación Marítima, S. A., v. Crespo, et al.* (de los Ríos, Spanish Ambassador, Intervener), 102 F. (2d) 444 (C.C.A. 2d, 1939).

¹³ See *Línea Sud-Americana, Inc., v. 7,295.40 Tons of Linseed*, 29 F. Supp. 210 (S.D.N.Y. 1939), which takes the same view concerning the effect of decrees for requisitioning ships. *The Motomar* was a Spanish vessel en route from Rosario, Argentina, to New York when the Republican Government issued a decree expropriating it for the public service. The master was notified by wireless of the expropriation and directed to proceed to Vera Cruz. The officers and crew having expressed their conformity with this order, the master disregarded

April 21, 1939, when the *Chargé d'Affaires* of the newly-recognized Nationalist Government of Spain secured, upon the representation of the Secretary of State and the Attorney General, an order of the Circuit Court of Appeals dismissing the above decree and ordering that *The Navemar* be delivered to the agents of the original owners.¹⁴ The new Spanish Government declined to take advantage of the decree in favor of its predecessor on the ground that this would have implied a recognition of the validity of the confiscatory legislation of the Azafia régime.

The case of *The Navemar* raised for reconsideration certain problems relating to the procedural aspects of sovereign immunity which have been a recurrent source of difficulty in controversies involving foreign states. Two related questions, concerning which a somewhat haphazard practice had grown up, are of special importance: (1) the methods by which a claim of immunity with respect to property alleged to be owned or possessed by a foreign state may properly be brought before a court; and (2) the weight to be attributed to such a claim when it has been properly presented.¹⁵ If the suit is brought against a foreign state or government *eo nomine* or against property readily identifiable as belonging to it, such as a war vessel, the court will ordinarily take judicial notice of the sovereign character of the defendant,¹⁶ or it will dismiss the action upon a suggestion submitted by the

contrary instructions from the owner's agents at New York. Judge Leibell said: "The decree of the Spanish Government, dated December 10th, 1936, together with the action of the master and the crew on December 15th, taking possession and control of the ship in behalf of the Spanish Government pursuant to said decree, transferred the title and right to possession of the 'Motomar' to the Spanish Government. [Citing *The Navemar*, 102 F. (2d) 444, *supra*]." 29 F. Supp. 210, 217.

¹⁴ See 103 F. (2d) 783 (C.C.A. 2d, 1939).

¹⁵ In general, see A. H. Feller, "Procedure in Cases Involving Immunity of Foreign States in Courts of the United States," this JOURNAL, Vol. 25 (1931), pp. 83-96; A. N. Sack, comment in 26 Illinois Law Review (1931), pp. 215-238; Francis Deák, "The Plea of Sovereign Immunity and the New York Court of Appeals," 40 Columbia Law Review (1940), pp. 453-465; "Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations," 50 Yale Law Journal (1941), pp. 1088-1093; and Stefan Riesenfeld, "Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine," 25 Minnesota Law Review (1940), p. 46 ff.

¹⁶ See *Puente v. Spanish National State*, 116 F. (2d) 43 (C.C.A. 2d, 1940). This was an action for professional services rendered. No appearance was entered for the defendant, but the Spanish Ambassador submitted a letter to the court pointing out that "under prevailing rules of international law the Spanish Government as a Sovereign State is not subject to suit in your Court without its consent, which in this case it declines to accord." In denying plaintiff's motion for a default judgment, the court said: "In this action, where there is no vestige of apparent jurisdiction, there would seem to be no reason why the plaintiff must not proceed in the usual way to show jurisdiction by alleging and proving defendant's consent to be sued; nor why, for lack thereof, the court, acting on its own motion or on appropriate suggestion . . . should not dismiss. And while the authorities are not numerous, presumably because such a suit is unusual, they all point that way. Courts take judicial notice of the sovereign character of a defendant and, in case of doubt, address their own inquiries to the executive. *Duff Development Co. v. Government of Kelantan* [1924], A. C.

Executive.¹⁷ But if the suit is against property claimed by a foreign state or against one of its instrumentalities, the foreign government or its authorized representative must now, in default of a suggestion by the Executive, appear specially to raise the plea of immunity.¹⁸ Formerly the practice varied, but a suggestion submitted either by a diplomatic agent or by an *amicus curiae* was usually deemed sufficient.¹⁹

The stricter rule was introduced after the decision of the Supreme Court in *Ex parte Muir*.²⁰ This was a suit in admiralty against the British steamship *Gleneden* to recover damages for collision. After process was issued and the vessel arrested, private counsel for the British Embassy, appearing as *amici curiae*, presented a suggestion that jurisdiction be declined on the ground that the vessel was under requisition for the public service, and argued that the allegations contained in the suggestion were conclusive. The court observed that the vessel was admittedly not a ship of war, and that while it might be temporarily in the service of the British Government, the nature and extent of that service were left in uncertainty by the proofs. *Prima facie*, the court had jurisdiction, and "to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion."²¹ The British Government or its accredited representative was entitled to enter a special appearance to propound its claim to the vessel or to raise the jurisdictional issue. If there was objection to appearing as a suitor, the court said, an alternative procedure could be followed:

797, 813. . . . Both English and American courts have held that a sovereign need not affirmatively assert this immunity. *Mighell v. Sultan of Johore* [1894], 1 Q. B. 149; *Nankivel v. Omsk All-Russian Government*, 237 N. Y. 150, 157, 142 N. E. 569; *Mason v. Intercolonial Ry. of Canada*, 197 Mass. 349, 83 N. E. 876. . . ." *Ibid.*, at p. 45.

¹⁷ See Deák, *loc. cit.*, p. 463.

¹⁸ "When a court appears to have all the elements of jurisdiction of an action, it is not improper to require of even a sovereign who would oust it of that jurisdiction that he furnish due proof to support his claim." *Puente v. Spanish National State*, 116 F. (2d) 43, 45 (C.C.A. 2d, 1940).

¹⁹ In the case of *The Maipo*, 252 Fed. 627 (S.D.N.Y. 1918), a Chilean naval transport, chartered to a private individual for commercial purposes, was held immune from process in a libel for breach of contract. The Chilean *Chargé d'Affaires* raised the plea of immunity in the form of a suggestion accompanied by a certificate from the Department of State attesting his diplomatic character. A similar procedure was followed in *The Carlo Poma*, 259 Fed. 369 (C.C.A. 2d, 1919); and *The Rogday*, 279 Fed. 130 (N.D. Cal. 1920).

Immunity has also been claimed by counsel for the foreign diplomatic representative appearing as *amicus curiae*: *The Athanasios*, 228 Fed. 558 (S.D.N.Y. 1915); *The Johnson Lighterage Co. No. 24*, 231 Fed. 365 (D.N.J. 1916); *The Roseric*, 254 Fed. 154 (D.N.J. 1918); and *The Adriatic*, 258 Fed. 902 (S.D.N.Y. 1918). ²⁰ 254 U. S. 522 (1921).

²¹ Merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough. These were matters which were not within the range of judicial notice and needed to be established in an appropriate way. . . . Thus from every point of view it was incumbent on those who called the jurisdiction in question to produce whatever proof was needed to sustain their challenge." 254 U. S. 522, 532.

. . . It was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. . . .²²

The failure of the British Government to raise its claim through the usual diplomatic channels was, the court declared, "a marked departure from what theretofore had been recognized as the correct practice. . . ."²³

The dictum in *Ex parte Muir* was made the basis of subsequent decisions relating to the procedure for raising the claim of sovereign immunity,²⁴ and was followed by the Supreme Court in *The Navemar*. When the libel was filed in this case, the Spanish Ambassador addressed a note to the Secretary of State on the public character of the vessel and requested him to take steps to procure its release. The Department of State replied that it was its practice in such cases "to refrain from taking any action which might constitute an interference by the executive authorities of this Government with regard to the merits of the controversy," and advised the Ambassador

²² 252 U. S. 522, 532.

²³ 254 U. S. 522, 533. In none of the cases cited (*The Cassius*, 2 Dall. 365 (1796); *The Exchange*, 7 Cranch 116 (1812); *The Pizzaro*, 19 Fed. Cas. No. 11,199 (1852); *The Constitution*, [1879] 4 P. D. 39; *The Parlement Belge*, [1879] 4 P. D. 129, [1880] 5 P. D. 197) was it suggested that the method of claiming immunity through an appearance by the government or its authorized representatives was an exclusive one. Furthermore, no notice is taken of the practice which had been followed by the inferior federal courts. See note 19, *supra*, and A. H. Feller, *loc. cit.*, at p. 88. Professor Deák has suggested that "A close reading of *Ex parte Muir* . . . would support the view that the distinction drawn by the Court was not so much between a special appearance of the foreign state to claim immunity and the assertion of such claim through the Executive, but rather between the *formal* presentation of this claim by *either* of these two methods and the *informal* filing of an *amicus curiae* affidavit by private counsel." *Loc. cit.*, at p. 460, note 21.

²⁴ In *The Pesaro*, 255 U. S. 216, 218 (1920), the Italian Ambassador presented a suggestion to the court that the ship was owned by the Italian Government. The Supreme Court decided: "Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion was made directly to the court, and not through any official channel of the United States. True, it was accompanied by a certificate of the Secretary of State, stating that the ambassador was the duly accredited diplomatic representative of Italy; but, while that established his diplomatic status, it gave no sanction to the suggestion. The terms and form of the suggestion show that the ambassador did not intend thereby to place himself or the Italian government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion,' and we think it was nothing more. In these circumstances the libelant's objection that, to be entertained, the suggestion should come through official channels of the United States, was well taken." See also *Società Commerciale di Navigazione v. Maru Navigation Co.*, 280 Fed. 334 (C.C.A. 4th, 1922). Cf. *De Simone v. Transportes Maritimos do Estado*, 199 App. Div. 602, 606, 191 N.Y.S. 864 (1922), in which the Appellate Division said that "However the objection [to jurisdiction] may be presented by the foreign sovereign, the court must give heed to it." See Feller, *loc. cit.*, pp. 88-90.

that his government had the right to appear directly before the court for adjudication of its claims.²⁵ Thereupon, the Ambassador submitted his suggestion of immunity to the district court, which held that it failed both in form and in substance to conform to the requirements clearly defined by the Supreme Court in the Muir case and *The Pesaro*.²⁶ In reversing the trial court, the Circuit Court of Appeals held that the Ambassador had followed an adequate and permissible procedure,²⁷ and that the allegations contained in the suggestion were binding upon the court. As to the latter point, Judge Manton said:

The claim of this public control is borne out by the ambassador's suggestion and his desire to intervene. The allegations of the suggestion we are bound to accept as conclusive. *Oetjen v. Central Leather Co.*, 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726; *Ricaud v. Amer. Metal Co.*, supra [246 U. S. 304]; *The Adriatic*, 258 F. 902 (C.C.A. 3). It is not for us to determine the validity of the decree affecting property within the foreign sovereign's dominion. If by any misadventure the authorized representative of a foreign state should make an unfounded suggestion, the proper remedy would be through diplomatic channels and not by legal proceedings against an independent sovereign or its property.²⁸

The Supreme Court considered that the court below had taken "a mistaken view of the force and effect of the suggestion," which, "though sufficient as a statement of the contentions made, was not proof of its allegations." Speaking for the court, Mr. Justice Stone said:

Admittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. . . . And in a case such as the present it is open to a friendly government to assert that such is the public status of the vessel and to claim her immunity from suit either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States.

If the claim is recognized and allowed by the executive branch of the

²⁵ Ambassador de los Ríos to Secretary Hull, Dec. 10, 1936; the Acting Secretary of State (Moore) to Señor de los Ríos, Dec. 11, 1936. Cited, Green H. Hackworth, *Digest of International Law*, II, pp. 449, 450.

²⁶ 17 F. Supp. 647, 649; 18 F. Supp. 153.

²⁷ 90 F. (2d) 673, 675, where the suggestion in the present case was held to be distinguishable from that deemed insufficient in *The Pesaro*, 255 U. S. 218.

²⁸ 90 F. (2d) 673, 676. In *The Adriatic*, 258 Fed. 902, 904 (C.C.A. 3d, 1919), the court stated that "On principles of international comity, we feel bound to accept the suggestion and avowal of the British ambassador as conclusively establishing both the fact of the requisition and its governmental character. Such has been the practice, as to similar facts, of the English courts . . . , and quite generally of the courts of this country. . . ." A similar view of the conclusive character of suggestions of immunity was taken in *The Maipo*, 252 Fed. 627, 628 (S.D.N.Y. 1918); *The Carlo Poma*, 259 Fed. 369, 370 (C.C.A. 2d, 1919); and *The Rogday*, 279 Fed. 180 (N.D. Cal. 1920). As to the English practice, see Preuss, this JOURNAL, Vol. 35 (1941), p. 267.

government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction. . . . The foreign government is also entitled as of right upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel and to raise the jurisdictional question in its own name or that of its accredited and recognized representative. . . .

After refusal of the Secretary of State to act upon the present claim, the Ambassador adopted the latter course. His application to be permitted to appear and present the claim was properly entertained by the district court. But it was not bound, as the Court of Appeals thought, to accept the allegations of the suggestion as conclusive. The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner as it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged.²⁹

The above decision definitely establishes the principle that a suggestion of immunity by a foreign sovereign with respect to property which is the subject-matter of a suit is not conclusive upon the courts. The suggestion constitutes merely a statement of the claim by the foreign state, and is not proof of the allegations contained therein. It gives to the foreign government only the right to intervene and prove that it owns or possesses the property in question. This much may be considered as settled in cases where there is "apparent jurisdiction." But the implications of the *dictum* concerning the force and effect of a suggestion of immunity emanating from the Executive are left uncertain. The Supreme Court has said that where the claim of the foreign government has been "recognized and allowed" by the executive branch it is the "duty" of the court to relinquish its jurisdiction. The difficulty arises in determining, from the vague and ambiguous language in which the attitude of the Executive is ordinarily expressed, precisely what claims have been so "recognized and allowed." In only two cases has the Executive made an affirmative motion to dismiss a suit for want of jurisdiction over a foreign sovereign.³⁰ In a few cases, the Executive has expressly indicated its disapproval of the claim of immunity;³¹ and in others it has declined to make the requested suggestion.³² Ordinarily it will merely transmit the statement of the foreign government's claim to the appropriate court, without taking any definite position as to its merits. In a number of cases the courts have declined to exercise jurisdiction even though the Executive has accompanied its statement of the foreign government's contentions with

²⁹ 303 U. S. 68, 74, 75.

³⁰ *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812); *Hassard v. United States of Mexico*, 173 N. Y. 645, 66 N. E. 1116 (1903).

³¹ *The Pesaro*, 277 Fed. 473, 479 (1921). See also the exchange of communications relating to this case between the Italian Ambassador and the Department of State. Hackworth, *Digest of International Law*, II, pp. 437, 438.

³² As in *The Navemar*.

an express disavowal of any desire to encroach upon the functions of the court or to influence its decision.³³ An exception is found in the case of *Lamont v. Travelers Insurance Company*, wherein the New York Court of Appeals held that the mere transmittal of a suggestion by the Department of State was not such a recognition and allowance of the claim of immunity as to be binding upon the court, but constituted a mere assertion without proof that the property in question belonged to the foreign sovereign, leaving to the court the problem of examining the claim.³⁴ This decision, however, was disapproved by a federal district court in the case of *Sullivan v. State of São Paulo*, in which a suggestion from the Department of State, expressed in terms quite as vague as those employed in the *Lamont* case, was held to be conclusive in effect.³⁵

³³ The suggestions transmitted by the Executive are regularly terminated by the statement that they have been presented as "a matter of comity . . . for such consideration as the court may deem necessary and proper." See, for example, the instructions from the Department of State to the United States Attorney in the case of *The Cucula*. Hackworth, *Digest of International Law*, II, p. 447.

³⁴ 281 N. Y. 362, 24 N. E. (2d) 201 (1939); this JOURNAL, Vol. 34 (1940), p. 349. The suggestion submitted in this case by the Secretary of State, through the Attorney General, was in the form described in note 33, *supra*.

In *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 261 App. Div. 1, 24 N.Y.S. (2d) 201 (1941), an action was brought against the defendant bank, which claimed immunity as an instrumentality of the Polish State. After the commencement of the action, the Polish Ambassador addressed a note to the Secretary of State, asserting that the defendant claimed immunity and requesting that the court be advised of the position taken by the Polish Government. The Secretary of State thereupon requested the Attorney General to instruct the proper United States Attorney to appear before the court and present the Polish Government's position "without argument or comment on his part other than to state that the statements of the Government of the Republic made in its behalf by the Polish Ambassador at Washington are brought to the attention of the court as a matter of comity between the United States and the Republic of Poland, a sovereign State duly recognized by the United States." Concerning the effect of this suggestion, Judge Close said: "It is urged that the action of the State Department amounted to a recognition and allowance of the defendant's claim to immunity by the executive branch of the United States Government. If that were a correct interpretation, the court would have been obliged, without further inquiry, to accept the claim of immunity and decline jurisdiction. *Compañía Española de Navegación Marítima, S. A. v. The Navemar*, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667. It is quite plain, however, that the State Department did not undertake to recognize the claim as valid or to influence the action of the court. It took a position of courteous neutrality. This left the court free to determine the question of jurisdiction, uninstructed by the executive branch of the government. *Lamont v. Travelers Ins. Co.*, 281 N. Y. 362, 24 N. E. (2d) 81; *Hannes v. Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189, 20 N.Y.S. (2d) 825." 24 N.Y.S. (2d) 201, 204 (1941).

³⁵ 36 F. Supp. 503 (E.D.N.Y. 1941). In this case the court expressly inquired of the Department of State whether it had "recognized and allowed" the claim of immunity made by the defendant. In reply the Counselor of the Department of State said: "The Department's earlier statements on this subject were not intended to indicate that it had 'recognized and allowed' the claim of immunity as a conclusion of law, but rather were intended, as indicated, to show that the Department felt that a *prima facie* case had been made out

The decision of the Supreme Court in the case of *The Navemar* provides a method whereby the unsatisfactory situation resulting from the present conflict of authorities may be resolved. It is open to the Department of State to "recognize and allow" the claim of the foreign state to immunity whenever the diplomatic interests of the United States so require. No question of a violation of the principle of the separation of powers is involved, in view of the position which the courts themselves have assumed. The underlying reason for the deference shown by the courts to the executive branch in questions touching sovereign immunity is that "it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision."³⁶ But the stand taken by the Executive can be conclusive on the courts only when it is expressed in conclusive language, and the Department of State is now scarcely in a position to complain if its customarily ambiguous utterances lead to an unnecessary concession of immunity in some jurisdictions and to its unwarranted refusal in others.³⁷

Since the Executive declined to make the requested suggestion of immunity, the Spanish Ambassador was compelled to furnish proof of his allegations concerning the possession and ownership of *The Navemar*. It has been pointed out that the Ambassador, in seeking to intervene, sought in reality to do two things: "The first was to secure judicial recognition of the claim that the ship was a public vessel and entitled as such to immunity from the local jurisdiction. The second was to gain judicial respect for the Spanish governmental title (acquired before the ship had reached American waters) and right to possession of the vessel."³⁸ It was the contention of

by the Government of Brazil, which justified the Department in having the statements presented to the court for its consideration. The Department's action necessarily implied an acceptance, as true, of the statements of fact made by the Brazilian Government. It was felt, however, that the ultimate decision of the question of immunity . . . should be left to the court. The action taken by the Department in these cases was similar to that taken in other cases where the Department felt that there was merit to the contention of the foreign government but did not undertake to pass upon such contention as a conclusion of law." Quoted in footnote 2 to Judge Moscowitz' opinion, *ibid.*, at p. 504. In holding that this statement was controlling, the court said: "If, where the claim of immunity is recognized and allowed by the executive, the court must relinquish jurisdiction, it is difficult to see why the same finality should not be given to the sovereign's presentation of facts where the same has been accepted as true by the executive branch of the government, as has been done herein. The same theories upon which one rests, are the basis of the other. If the word of a sovereign is not to be questioned where accepted by the executive, then the rule applies equally to the case where the executive accepts as true only the facts, and by reason of lack of desire to usurp judicial functions does not pass upon the ultimate legal question of immunity." *Ibid.*, at p. 506.

³⁶ *Ex parte Muir*, 254 U. S. 522, 533 (1921).

³⁷ See 50 Yale Law Journal (1941), pp. 1092, 1093.

³⁸ C. C. Hyde, "Concerning *The Navemar*," this JOURNAL Vol. 33 (1939), p. 531.

the Spanish Government that it had obtained possession, as well as ownership, of *The Navemar* in Argentina through notification of the decree of requisition to the master, and the endorsement by Spanish consuls of the ship's roll and register with the statement that the vessel had become "the property of Spain."³⁹ The district court, in denying the motion to vacate the default decree, held that the Spanish Government had failed to show that it had taken actual possession of the vessel and was operating it in the public service and interest.⁴⁰ On the second application, the court reviewed the conflicting evidence bearing upon the question, and concluded that it was "clear beyond peradventure that prior to the seizure of the steamship *Navemar* in territorial waters of the United States by the committee of the crew, the steamship *Navemar* was never in the possession of the Republic of Spain." At most, only a "constructive possession" could be asserted, but, the court stated:

Neither under the law of nations nor of local law is authority cited which impels a holding that such "constructive possession" is the equivalent of physical possession. So far as can be ascertained, certainly in none of the classic cases decided either in the United States or in England has such an issue been determined.⁴¹

³⁹ The suggestion filed by the Ambassador, through the Acting Consul General, read in part: "The said Louis Careaga in his official authority and capacity aforesaid (as Acting Consul General) represents to this Honorable Court that in the month of October, 1936, the Consul General of the Republic of Spain at Rosario, Argentina, pursuant to instructions from the General Director of the Spanish Merchant Marine, took possession of the said Steamship *Navemar*, in the name of the Republic of Spain under decree of the Republic of Spain dated the 10th day of October, 1936, whereby the said Steamship *Navemar* then and there became and at all times since has remained the property of the Government of the Republic of Spain."

⁴⁰ 17 F. Supp. 647, 650 (E.D.N.Y. 1936).

⁴¹ 18 F. Supp. 153, 157 (E.D.N.Y. 1937). Judge Galston, in holding that the Spanish Government had failed to establish possession emphasized the following points: that the vessel, up to the time of its seizure at New York, was manned by officers and crew in the employ of the libellant; that its privately-owned cargo was delivered to the consignees at New York; and that the freight was collected by the master in behalf of the charterer. Evidence pointing to submission by the master to the decree of requisition was either ignored or discounted. The affidavit filed by the Acting Consul General alleged that the master had sent a cable from Buenos Aires to the Director of Navigation in Spain, stating that he had been authorized by the Consul General at Buenos Aires to proceed to New York. Furthermore, a member of the crew had testified that the master had called the crew together at Buenos Aires, informed them of the attachment of the vessel, and stated that he would henceforth act as the legitimate representative of the Republican Government. This statement was denied by the master. On December 7, 1936, the master wrote to the charterer of *The Navemar* that "Since October 28th (1936) I have been operating under orders of the Spanish Consul at Buenos Aires. . . . Since arriving at New York I have presented myself to the Spanish Consul here and he has given me orders that the steamship 'Navemar' is still to be held at the disposal of the Spanish Government." On December 2, 1936, the master signed a receipt acknowledging that the Consul General at New York had given him \$300 as an advance to attend to the expenses of the vessel. It was held by the district court and by the Supreme Court, for reasons which seem unconvincing, that the above acts

The Circuit Court of Appeals held, on the contrary, that constructive possession was sufficient and that, for purposes of immunity, it is "as efficacious as actual possession asserted through the government's own officers."⁴²

This doctrine was disapproved by the Supreme Court, which insisted upon the necessity of actual possession as prerequisite to immunity. Agreeing with the conclusion of the district court that the evidence at hand did not support the claim that *The Navemar* had been in the possession of the Spanish Government, Mr. Justice Stone said:

The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum*, actual possession by some act of physical dominion or control on behalf of the Spanish Government was needful, *The Davis*, 10 Wall. 15, 21; *Long v. The Tampico*, 16 Fed. 491, 493, 494; *The Attualita*, *supra* [238 Fed. 909]; *The Carlo Poma*, 259 Fed. 369, 370, . . . or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government. Both were lacking, as was support for any contention that the vessel was in fact employed in the public service.⁴³

did not show possession on the part of the Spanish Government or offset other evidence that the master was acting at all times for the owner of the vessel. See also the review of the evidence by the district court, 24 F. Supp. 495 (E.D.N.Y. 1938).

⁴² 90 F. (2d) 673, 677 (C.C.A. 2d, 1937).

⁴³ 303 U. S. 68, 75, 76 (1938).

A close reading of the opinions of Judge Manton and Mr. Justice Stone shows that they are probably agreed as to the necessity of possession as a ground for immunity, but that they are in disagreement as to the facts upon which the alleged possession of the Spanish Government was based, and as to the definition of "possession". Judge Manton's reasoning is not free from ambiguity. The Spanish Government, he said, obtained "constructive possession" of the vessel by "subjecting it to its control." 90 F. (2d) 673, 677. *The Navemar*, although in Argentine waters at the time the decree of requisition was issued, was subject to the jurisdiction of the Spanish Government since it was to be considered, "constructively, at least, as part of the territory of the sovereign whose flag it flies. . . ." *Ibid.*, at 676. This would seem to imply that in Judge Manton's opinion the mere act of requisition, unaccompanied by any taking of actual possession, suffices as a basis for immunity. But this doctrine of "control," which is based upon that of the "quasi-territoriality" of ships, is not, it is believed, a part of the *ratio decidendi*, for Judge Manton goes on to point out that, according to his view of the evidence, the master had acted under the instructions of the Spanish Government from the time he was notified of the decree of requisition. It appears, therefore, that in his opinion such possession, obtained through recognition of the requisition by the master, constitutes "constructive possession," as distinguished from possession through the government's own officers. In support of his position he cites Hyde, *International Law*, II, pp. 444, 445, who states that "When . . . the officers acknowledge the duty to obey the governmental assertion of control and act accordingly, the circumstance that the vessel is neither owned nor actually possessed by the requisitioning State would appear to be immaterial. In such case the dedication of the ship to the public service would seem to render the constructive possession by the sovereign as efficacious for purposes of exemption as actual possession manifested by the assertion of control through the medium of its own officers." "Constructive possession," so understood, is clearly within the requirements for immunity laid down by Mr. Justice Stone, who pointed out that in the case of *The Jupiter*

In imposing this strict test of possession, the Supreme Court was applying a doctrine which had been developed by analogy from cases involving property of the United States.⁴⁴ Possession by officials of the requisitioning government or through the ship's officers acting in its behalf, and not the appropriation and dedication of the vessel to the public service under governmental authority, was emphasized as being essential for immunity.⁴⁵ The

(No. 3), (1927) P. 122, on which respondent relied, the master had repudiated the possession and ownership of the plaintiffs and held the vessel for the claimant government. 303 U. S. 68, 76.

⁴⁴ The doctrine that actual possession is required for claiming immunity appears to have its origin in *The Davis*, 10 Wall. 15 (U. S. 1869), in which a lien for salvage claims was enforced against cotton owned by the United States, but in the possession of a common carrier. In *Long v. The Tampico*, 16 Fed. 491 (S.D.N.Y. 1883), two revenue cutters built for the Mexican Government and en route for Mexico in the hands of a bailee were held subject to salvage claims; and in *The Beaverton*, 273 Fed. 539 (S.D.N.Y. 1919), a vessel chartered, but not possessed, by the French Government was held subject to a libel. See also *The Johnson Lighterage Co. No. 24*, 231 Fed. 365 (D.N.J. 1916). The principle was stated by Ward, J., in the case of *The Carlo Poma*, 259 Fed. 369, 370 (C.C.A. 2d, 1919), as follows: "The law of the United States is the same [as that of England], except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time process is served." See Riesenfeld, 25 Minnesota Law Review (1940), pp. 36-45.

⁴⁵ The Supreme Court stressed the fact that in the case of *The Cristina*, [1938] A. C. 485, the possession taken in behalf of the claimant government was actual, and that the master and crew were in the pay of the Spanish Government. 303 U. S. 68, 76. This latter point was deemed to be decisive in *The Attualita*, 238 Fed. 909 (C.C.A. 2d, 1916), in which an Italian ship, requisitioned by the Italian Government, was held subject to a libel. It appeared that the vessel was hired by the Italian Government at a fixed rate, and was navigated by officers and a crew employed by the owners, who paid their wages and other expenses of the ship. These facts were also referred to, as negating the claim of the Italian Government to possession, by the Secretary of State in his reply to the protest of the Italian Ambassador following the decision in *The Attualita*. Hackworth, *Digest of International Law*, II, p. 426. Compare *The Roseric*, 254 Fed. 154 (D.N.J. 1918), a case in which the facts are practically identical. In dismissing a libel against a ship requisitioned by the British Government, Rellstab, J., stated: "The British Government, in the exercise of its sovereign powers, took the *Roseric* and devoted it to its own purposes. That no change in the officers and crew took place, and that they continued in the employment of the ship's owner, is unimportant. The ship, its owner, officers and crew were under the compulsion of sovereignty. . . . Whether the government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination. The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force. In legal effect a ship so subjected to *vis major* is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy. . . . It is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to such [public] service, that exempts it from judicial process. That in such use the owner of the instrumentality, through its servants, is permitted to remain in physical possession thereof . . . is of no moment, where, as in this case, the ship and its entire equipment is under the absolute dominion of the sovereign." *Ibid.*, at 160, 161, 162.

question had never before been squarely before the Supreme Court, and the inferior federal courts were disagreed. In a number of cases it had been held or intimated by way of *dictum* that the act of requisition alone is operative to confer immunity, even though it is *in invitum* and unaccompanied by any actual taking of possession.⁴⁶ But these earlier decisions must now be considered to have been overruled by the decision of the Supreme Court in the case of *The Navemar*. Nearly all had their origin in the period of the World War, when the national interests of the United States required that there should be no obstruction of the wartime efforts of its cobelligerents.⁴⁷ It may be argued that the exigencies of civil conflict are quite as urgent as those of international war, and the Supreme Court might well have relaxed its strict requirements as to possession in favor of a government which was struggling for its existence against its domestic and foreign enemies. But in recent years there has been a discernible judicial trend toward the restriction of state immunity in both its procedural and substantive aspects, and the decision in *The Navemar* is in conformity with this tendency.

Although the Spanish Government was held to have failed to dispossess

⁴⁶ See *The Roseric*, note 45, *supra*, and 37 Columbia Law Review (1937), p. 658. The following are not strictly immunity cases, but they present a close analogy. In *Earn Line S. C. Co. v. Sutherland S. C. Co., Ltd.*, 254 Fed. 126 (S.D.N.Y. 1918), it was held that requisition of a British vessel by the British Government was an excuse for breach of contract under a time charter excepting restraints of princes. The court rejected libellant's contentions that the requisition had become effective, not by reason of its notification to the owner, but because of the owner's acquiescence therein; and that the restraint of princes clause refers merely to physical restraint. Concerning the first point, L. Hand, J., stated: "It appears to me somewhat naïve to suppose, under such circumstances as then existed, that the British Admiralty made requisitions dependent upon the consent of the shipowner." *Ibid.*, at 129. In affirming, Hough, J., held that the second proposition was untenable, and that the requisition was a command having the force of law, even in the absence of any seizure, actual or threatened, by the British authorities. *The Claveresk*, 264 Fed. 276 (C.C.A. 2d, 1920). See also *The Adriatic*, 258 Fed. 902, 904 (C.C.A. 3d, 1919). In *The Athanasios*, 228 Fed. 558 (S.D.N.Y. 1915), a libel against a Greek vessel requisitioned by the Greek Government was dismissed, and performance of contract held to have been prevented by restraint of princes. The court said: "This Greek steamer cannot fulfill her charter without lawfully clearing from this port; she cannot clear without her papers; the Greek consul has them, under orders from his government to see to it that the vessel loads for governmental purposes. . . . There is certainly no power in any court of the United States to prevent or undo this act of the Greek king and his consul. It is of no moment whether the Greek municipal law is being correctly interpreted by the various Greek officials concerned—the restraint is actual and is governmental. Restraint need not be by physical force. . . . It is unnecessary to parade the opinions; the essential holding is that restraint which fulfills the exception must be actual, not potential or probable, and must emanate from recognized authority, not, *e.g.*, the brute power of a pirate. I am quite unable to conceive any more actual restraint than is here present. The *Athanasios* has been in effect seized by the Greek consul, evidently much against the will of her owner and master." *Ibid.*, at 560, 561. The English decisions are similar: *Sanday & Co. v. British and Foreign Marine Ins. Co.*, [1915] 2 K. B. 781; *Capel v. Souliidi*, [1916] 2 K. B. 365; *Furness, Withy & Co. v. Rederiaktiebolaget Banco*, [1917] 2 K. B. 873.

⁴⁷ See the remarks of Rellstab, J., in *The Roseric*, 254 Fed. 154, 156, 160.

the owner prior to the entry of *The Navemar* into American waters, it had obtained *de facto* possession through seizure of the vessel in New York Harbor by a committee of the crew purporting to act in its behalf. The district court held, and the Supreme Court agreed, that no claim of immunity could be founded upon possession so obtained. Holding that possession must be peaceably acquired, Judge Galston said:

. . . The facts disclose that disregarding the orderly processes of the local law, an attempt was made forcibly to seize property within the sovereign domain of the United States. It is extremely difficult to believe that the claim of immunity set up herein by the Spanish Consul General, appearing for the Spanish Ambassador, can stem from such acts. . . .

Baldly, the question presented is whether a foreign nation can by edict confiscate property not within its sovereign domain nor otherwise within its possession or control, seize such property within the sovereign domain of another power, and claim immunity from suits in the courts of such latter nation. In all reason the answer to such question must be in the negative.⁴⁸

It is implied that it was neither the taking of possession in American waters, nor the fact that it was effected by acts which might constitute a tort against the owner, that excluded the claim to immunity. It seems probable that *de facto* possession obtained without the use of violence, actual or potential, would have sufficed, even in the absence of any recognition on the part of the master that he was controlling the vessel in behalf of his government. But the action of the crew in seizing the vessel while the master was ashore, and their threat to detain him should he return, was deemed to have constituted a breach of the peace in contempt of the local law.⁴⁹

⁴⁸ 18 F. Supp. 153, 158 (E.D.N.Y. 1937).

⁴⁹ In the case of *The Cristina*, [1938] A. C. 485, the House of Lords held that possession might be taken in British waters, provided that this could be done without public disorder or overt resistance. It was considered that no breach of the peace had in fact occurred, although the Spanish consul had boarded the vessel and broken into the master's cabin in order to obtain the ship's papers. *Ibid.*, at 493, 509, 514, 517.

De facto possession, obtained by a requisitioning government outside the territorial waters of the United States would apparently be respected in all cases. The method by which such possession was obtained, whether by force or by acts in violation of the law of the foreign state, would be immaterial. The question whether the vessel was subject to the jurisdiction of the foreign state at the time of seizure would be relevant only in cases involving the title and right to possession (or in cases involving the rights of a transferee of title from the requisitioning state). It would not arise in a case in which immunity, based on *de facto* possession obtained outside the territorial limits of the state of the forum, is claimed. Cf. *El Condado*, 63 Ll. L. Rep. 330; this JOURNAL, Vol. 35 (1941), pp. 276-280.

At the second trial in the case of *The Navemar*, the district court raised the question whether the crew was authorized by Spanish law to take possession in behalf of their government. 24 F. Supp. 495, 497 (E.D.N.Y. 1938). This was clearly irrelevant, since the seizure was ratified by the Spanish Ambassador and thereby became a governmental act not open to examination by the courts, unless required by some compelling reason of public policy (in the instant case, because the seizure was effected in disregard of the orderly processes of

The question whether a foreign government may claim immunity for a vessel which it has requisitioned and peaceably reduced to possession in American waters was answered affirmatively in the case of *Ervin v. Quintanilla*,⁵⁰ decided some months after the decision of the Supreme Court in *The Navemar*. The *San Ricardo*, property of a Mexican corporation, was at the port of Mobile, Alabama, for the purpose of repairs when it was requisitioned by decree of the Mexican Government. The Mexican consul stationed at New Orleans proceeded to Mobile in accordance with instructions from his government, and there received the consent of officers and crew to the requisition, and "peaceably, but fully and completely, and in every way possible, took possession of the vessel for the Republic of Mexico."⁵¹ Shortly thereafter, the temporary receiver for the assets of the owner filed a possessory libel against the vessel, and the Mexican *Chargé d'Affaires* appeared specially to claim immunity.⁵² The district court dismissed the libel for want of jurisdiction, and the decree was affirmed by the Circuit Court of Appeals. Rejecting the contention of appellant that possession, in order to found a claim of immunity, must have begun before the vessel entered American waters, Judge Hutcheson said:

No case has been cited, none can be found in any jurisdiction, holding that possession of a ship, taken by a friendly foreign power in the waters of another government, peaceably and without the exercise of force, involving neither breach of its peace nor other violation of the municipal laws of that government, is ineffective to support the foreign government's immunity.

It is of course true that no foreign government may, in breach of our laws, or against our consent, exercise any act of sovereignty here. . . . The taking possession in this case was not an act of sovereignty in the sense appellant means, the exertion of superior force, in order, without our consent, to violate our sovereignty or override the operation of our laws. It was merely a series of physical acts done by the consular representative of Mexico in its behalf, and of acceptance of those acts by the Master and the crew, and by the shipbuilding company, all of this accomplished peaceably, completely without disorder, and entirely in subordination to the sovereignty and laws of the United States.⁵³

the local law). See *Banco de España v. Federal Reserve Bank of New York*, 28 F. Supp. 958, 972 (S.D.N.Y. 1939); affirmed, 114 F. (2d) 438, 443, 444 (C.C.A. 2d, 1940).

In several cases the validity of requisitions by the British Government has been challenged on the ground that they were contrary to British law. It was uniformly held that the requisition was a governmental act, the legality of which could not be inquired into by the courts. *The Adriatic*, 258 Fed. 902, 903 (C.C.A. 3d, 1919); *The Claveresk*, 264 Fed. 276, 281 (C.C.A. 2d, 1920); *The Texas Co. v. Hogarth Shipping Co., Ltd.*, 256 U. S. 619, 628 (1920); *The Island of Mull*, 278 Fed. 131, 132 (C.C.A. 4th, 1921).

⁵⁰ 99 F. (2d) 935 (C.C.A. 5th, 1938); *cert. denied*, 306 U. S. 635 (1939). ⁵¹ *Ibid.*, at 937.

⁵² A request by the *Chargé d'Affaires* that the Department of State recognize and allow the claim of the Mexican Government to immunity was refused on the same grounds as in *The Navemar*. Hackworth, *Digest of International Law*, II, pp. 455, 456.

⁵³ 99 F. (2d) 935, 940. Judge Hutcheson considered that the taking of possession in waters of the United States, in pursuance of a decree of requisition issued in Mexico, was

Prior to the decision of the Supreme Court in *The Navemar*, the issue was that of immunity. Although the Spanish Government had related its claim to the decree of requisition, as one of the acts by which its alleged possession was taken, this did not put at issue its title and right to possession.⁵⁴ Having denied immunity, the Supreme Court referred back only this latter question for determination at the second trial. It was necessary, therefore, to consider what effect should be given to the decree of requisition, and whether it was operative to transfer title to a vessel outside Spanish waters. The district court considered that the decree was in effect a penal statute, unenforceable in the courts of the United States.⁵⁵ The Circuit Court of Appeals disagreed with the court below as to the nature of the decree in question. Judge Augustus Hand took the view that there was no public policy against the enforcement of an expropriation decree merely because it furthers a governmental interest of a foreign state.⁵⁶ Furthermore, there was no proof that the owner was to receive no compensation, and it was not to be assumed that the provisions of the Spanish Constitution prohibiting the confiscation of private property would be disregarded.⁵⁷ Even if the decree were of a confiscatory nature, it was applicable to property which was within the juris-

"no different in incidents, quality and effect from one taken by a voluntary transfer." Although he carefully pointed out that the sole issue was that of possession, he intimated that he would consider that the requisition was operative to transfer title and right to possession of the vessel to the Mexican Government, if the issue were raised in a proper case. Ships, he implied, may be governed by principles other than those applicable to chattels on land: "Whether the maintenance of this view as to taking possession of ships in our waters will, as appellant maintains, result in its being extended to things seized on land, so as to lead to the imagined situation of the property of nationals of a foreign country being seized from them in this country under the authority of a foreign expropriation decree, we need not seriously consider, for it is not before us. It may be that since a vessel is considered constructively a part of the territory of the sovereign whose flag it flies, and is subject on the high seas or in territorial waters to the jurisdiction of that sovereign, *The Navemar*, 2 Cir. 90 F. 2d 673, 676, and cases cited (c/f *The Cristina*, *supra*), the taking possession of a ship in navigable waters presents an entirely different question from the taking possession of property on land. It is not necessary, however, for us to so decide." *Ibid.*, at p. 941.

See *Yokahama Specie Bank, Ltd. v. Chengting T. Wang*, 113 F. (2d) 329 (C.C.A. 9th, 1940), in which jurisdiction over a Chinese vessel, expropriated by the Chinese Government while it was at the port of San Francisco, was declined. The court held that the expropriation was accomplished peaceably, and that since China was not a formal belligerent, no breach of American neutrality was involved. See Riesenfeld, 25 *Minnesota Law Review* (1940), pp. 53-55.

⁵⁴ See *Ervin v. Quintanilla*, 99 F. (2d) 935, 939 (C.C.A. 5th, 1938).

⁵⁵ 24 F. Supp. 495, 500, 501 (E.D.N.Y. 1938).

⁵⁶ 102 F. (2d) 444, 449 (C.C.A. 2d, 1939), citing Mr. Justice Stone's concurring opinion in *United States v. Belmont*, 301 U. S. 324, 334 (1937).

⁵⁷ 102 F. (2d) 444, 449. Article 44 of the Spanish Constitution of 1931 provides: ". . . La propiedad de toda clase de bienes podrá ser objeto de expropiación forzosa por causa de utilidad social mediante adecuada indemnización. . . . En ningún caso se impondrá la pena de confiscación de bienes." The decree of October 10, 1936, moreover, provided for the assumption by the Spanish Government of all obligations of the owner to creditors.

diction of Spain at the time it was issued, and should, therefore, be given effect. On the authority of *Crapo v. Kelly*,⁵⁸ Judge Hand considered that ships were "quasi-territorial" and that *The Navemar* was subject to the jurisdiction of Spain, although without its territorial limits on the date of requisition. Applying this doctrine to the present case, he said:

... We are not enforcing claims of another state to property beyond its jurisdiction, as would have been the case if the subject-matter had been a chattel that was within the State of New York when the appropriation became effective. The situation here resembles that of the appropriation of tangibles within the confines of Spain which afterwards reached our shores. There we should recognize the title acquired under the laws of the foreign state. *Oetjen v. Central Leather Co.*, 248 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726; *Princess Paley Olga v. Weisz*, (1929) 1 K. B. 718, 723, 731, 735, (C. A.). *Cf. Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220, 186 N. E. 679, 89 A.L.R. 345. In either situation the decree of the foreign state is recognized as passing title because jurisdiction is held to exist.⁵⁹

In order to reach the above result it was perhaps unnecessary to lean so heavily upon the doctrine of the "quasi-territoriality" of ships, which, as Mr. Justice Van Devanter has said in *Cunard S. S. Co. v. Mellon*, is "a figure of speech, a metaphor." Jurisdiction over ships, it is true, "partakes more of the characteristics of personal than of territorial sovereignty,"⁶⁰ but its unique basis cannot be fully explained in terms of either. It is arguable that where a government has jurisdiction, whether personal or territorial, over the owner or those who have custody of a vessel, the vessel itself is within the jurisdiction of that government for purposes of subjecting it to a decree of requisition.⁶¹ Although it has never been formulated in express terms, this proposition seems to have been necessarily implied in a number of decisions which have held requisition decrees to be binding, whether the notification reached the vessel in national waters,⁶² on the high seas,⁶³ in a port of the state of the forum,⁶⁴ or in a port of a third state.⁶⁵ In none of these cases was it assumed that the application of a decree of requisition to a vessel on the high seas was invalid as constituting an extra-territorial exercise of state authority.

The decisions of the United States courts in ship requisition cases, and

⁵⁸ 16 Wall. 610 (1873).

⁵⁹ 102 F. (2d) 444, 449. "Even if the decree might not be effective while *The Navemar* was at Buenos Aires, nevertheless it was an instrumentality of expropriation that would become operative upon the vessel as soon as she reached the high seas." *Id.*, *loc. cit.*

⁶⁰ 262 U. S. 100, 123 (1923).

⁶¹ See 37 Columbia Law Review (1937), p. 658.

⁶² *The Texas Co. v. Hogarth Shipping Co.*, 256 U. S. 619 (1920).

⁶³ *Linea Sud-Americana, Inc. v. 7,295.40 Tons of Linseed*, 29 F. Supp. 210 (S.D.N.Y. 1939).

⁶⁴ *The Athanasios*, 228 Fed. 558 (E.D.N.Y. 1915); *The Adriatic*, 258 Fed. 902 (C.C.A. 3d, 1921).

⁶⁵ *The Luigi*, 230 Fed. 493 (E.D. Pa. 1916); *The Claverack*, 264 Fed. 276 (C.C.A. 2d, 1920).

particularly in the case of *The Navemar*, have raised a number of questions which remain unanswered. The following propositions, which relate solely to the substantive aspects of the law, seem, however, to be well settled:

(1) Actual possession of a requisitioned ship by the requisitioning government is essential to found a claim of immunity. Possession must be established through some act of physical control by agents of the requisitioning government, or by recognition on the part of the ship's officers that they are acting in behalf of the requisitioning government.

(2) In order to found a claim of immunity, possession need not be taken with the consent of the owner, nor need it be acquired by means which are in conformity with the law of the requisitioning state; if possession is taken in American waters, however, it must not involve the use of force or a breach of the peace.

(3) For purposes of requisitioning, a national vessel is considered as "quasi-territorial." Therefore, the requisitioning of a ship while it is on the high seas (or, *semble*, while it is within the territorial waters of another state) is not an extraterritorial exercise of state authority.⁶⁶

⁶⁶ The courts of the United States were not called upon to decide any cases involving the status of General Franco's Nationalist Government prior to its recognition as the Government of Spain. As an unrecognized government, it would almost certainly have been denied the right to maintain a suit, *The Penza*, 227 Fed. 91 (E.D.N.Y. 1921); *R.S.F.S.R. v. Cibrario*, 235 N. Y. 255 (1923); and it would have been immune from direct suit, *Wulfsohn v. R.S.F.S.R.*, 234 N. Y. 372 (1923); *Nankivel v. Omsk All Russian Government*, 237 N. Y. 150 (1923). But in cases in which it did not appear as a formal party, as in suits against a ship, it would have been denied immunity under the rule of *Ex parte Muir*, 254 U. S. 522 (1921), since the State Department would have refused to make any suggestion to the court, and the unrecognized government, in the absence of diplomatic representation, would have been unable to intervene to raise the claim of immunity, *The Gul Djemal*, 264 U. S. 90 (1924). If, however, the requisition by the unrecognized government had become operative upon a ship in territorial waters under its *de facto* control (or, perhaps, upon a ship registered at a port under its *de facto* control), the rights of a transferee of title would have been protected, if the ship had been subsequently brought into waters of the United States, *Salimoff & Co. v. Standard Oil Co. of New York*, 262 N. Y. 220 (1933). See Feller, this JOURNAL, Vol. 25 (1931), p. 96; Louis L. Jaffe, *Judicial Aspects of Foreign Relations* (1933), pp. 140-162; and, for the British practice with reference to the status of the Nationalist Government of Spain, this JOURNAL, Vol. 35 (1941), pp. 269-276.

SOME ASPECTS OF THE JURISPRUDENCE OF NATIONAL CLAIMS COMMISSIONS

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Many applications of international law receive but little attention from the general public. Unpublicized or little-publicized settlements involving relatively obscure persons and comparatively small amounts of money tend to be undramatic. They may seem of little importance during a period of major, kaleidoscopic developments in a worldwide conflict. But the fact remains that in numerous instances rules have become the bases for the disposition of practical questions which were of importance to the individuals immediately involved and of some concern to their respective governments. Collectively, these dispositions may help to attest the vitality of the principle of legality. At a time when the world situation puts in question the very fundamental elements of an international legal system, there may still be justification for drawing attention to the manner in which settlements of private claims against governments have been and are effected.¹

Such claims settlements have sometimes constituted the function of national, or "domestic," as distinct from international, or mixed commissions. The present inquiry has for its purpose to examine, in some of its aspects, the work of commissions of this kind which the United States utilized over a century of its national history. Within the limits of a short study, it is not possible to present in great detail the jurisprudence of these bodies, whose records have sometimes comprised voluminous materials. For the present purpose the special objects of consideration will be the essential nature of the commissions, including the rôle of the United States Government in relation to them, the application by them of international law either customary or conventional, and some of the special problems which the commissions have encountered and which serve to distinguish their work from that of regular international tribunals. A comparative view of the work of fourteen national claims commissions set up by the United States from 1803 to 1902, inclusive, affords evidence of the techniques employed, and some basis for observations concerning the jurisprudence of these agencies.²

¹ For a statement of the value of claims adjudications in general, see Fred K. Nielsen, *International Law Applied to Reclamations* (1933), pp. 3-5.

² The fourteen commissions, in chronological order of the treaties which preceded their establishment, are those which handled claims originally arising against the following states, respectively (the date in each case being that of the treaty or convention): France, April 30, 1803 (8 Stat. 208, 18 Stat. [2] 236); Spain, Feb. 22, 1819 (8 Stat. 252, 18 Stat. [2] 712); Great Britain, Nov. 13, 1826 (8 Stat. 344, 18 Stat. [2] 308); Denmark, March 28, 1830 (8 Stat. 402, 18 Stat. [2] 170); France, July 4, 1831 (8 Stat. 430, 18 Stat. [2] 245); Two Sicilies, Oct. 14, 1832 (8 Stat. 442, 18 Stat. [2] 771); Spain, Feb. 17, 1834 (8 Stat. 460, 18 Stat. [2] 718; Peru,

The basic principle of state responsibility for injuries to the persons or property of aliens has furnished occasion for the development. National claims bodies have commonly functioned after treaty settlements, as between the two states concerned, of questions involving personal or property damage. Accumulated claims of nationals of one country may be met, internationally, by payment of a lump sum to the government of the claimants' state. Or, without such payment, the latter may agree, for other considerations (perhaps for "valuable consideration," as Mr. Madison expressed it in connection with certain spoliation claims of the Napoleonic War period) to release the other state from liability and itself accept responsibility for claims of its own nationals. Illustrative of the first method are the convention of January 27, 1849, with Brazil,³ and the better known *Alabama*

March 17, 1841 (8 Stat. 570, 9 Stat. 815, 18 Stat. [2] 611); Mexico, Feb. 2, 1848 (9 Stat. 922, 18 Stat. [2] 492); Brazil, Jan. 27, 1849 (9 Stat. 971, 18 Stat. [2] 90); China, Nov. 8, 1858 (12 Stat. 1081, 18 Stat. [2] 146); Great Britain, May 8, 1871 (17 Stat. 863, 18 Stat. [2] 355); Spain, Dec. 10, 1898 (30 Stat. 1754); China, Sept. 7, 1901, Jan. 3, 1902 (protocol), Malloy, *Treaties*, I, 260.

The list does not include domestic agencies which have been used for the computation of amounts due aliens for injury by the United States, such as the East and West Florida claims under Art. IX of the Treaty of 1819 with Spain. (J. B. Moore, *International Arbitrations*, V, 4524.) Nor does it include outright awards of damages on specific claims by international agreements, such as the United States secured from Venezuela by exchange of notes in 1844, and by conventions of Nov. 16, 1846, April 12, 1848, July 7, 1849, May 1, 1852, June 1, 1853, Feb. 27, 1858, Jan. 14, 1859, and Oct. 18, 1860. (Sen. Doc. No. 10, 36th Cong., 2nd Sess.) The French spoliation claims settlements by the Court of Claims are not included, since the list includes only agencies other than already established courts. See, however, notes 12 and 78, *infra*.

³ Art. I: "The two High Contracting Parties, appreciating the difficulty of agreeing upon the subject of said reclamations, from the belief entertained by each,—one of the justice of the claims, and the other, of their injustice,—and being convinced that the only equitable and honorable method by which the two Countries can arrive at a perfect understanding of said questions, is to adjust them by a single act; they mutually agreed, after a mature examination of these claims; and, in order to carry this agreement into execution, it becomes the duty of Brazil to place at the disposition of the President of the United States the amount of five hundred and thirty milreis, current money of Brazil, as a reasonable and equitable sum, which shall comprehend the whole of the reclamations, whatever may be their nature, and amount, and as full compensation for the indemnifications claimed by the Government of said States; to be paid in a round sum, without reference to any one of said claims, upon the merits of which the two High Contracting Parties refrain from entering; it being left to the Government of the United States to estimate the justice that may pertain to the claimants, for the purpose of distributing among them the aforesaid sum . . . as it may deem most proper."

Art. II: "In conformity to what is agreed upon in the preceding article, Brazil is exonerated from all responsibility springing out of the aforesaid claims presented by the Government of the United States up to the date of this Convention, which can neither be reproduced, nor reconsidered in future." 5 Miller, *Treaties*, 508-509.

Peru, by the 1841 convention, was to pay to the United States 300,000 "hard dollars" of the same standard and value as those then coined at the mint in Lima. 4 Miller, *Treaties*, 329, 331.

claims settlements. The second method finds illustration in the plan of Articles XIV and XV of the Treaty of Guadalupe-Hidalgo, by which, in part consideration for the territory obtained from Mexico, the United States discharged the Mexican Republic from claims of citizens of the United States against Mexico not theretofore decided.⁴ The relinquishment of claims may be mutual, as was the case between the United States and Spain in 1898, when the United States accepted in the peace treaty the obligation to settle the claims which it had thus relinquished.⁵

In size, the commissions have varied from one to five members. In one instance (under the 1841 convention with Peru) the Attorney General of the United States functioned as the commissioner. Three of the fourteen commissions sat abroad.⁶ In most instances, time limits originally set for the completion of work were extended. When the sums received by the United States were not sufficient to satisfy all the awards, the amounts had to be prorated. One commission was empowered to fix the amount to be paid as fee to counsel by any claimant, as well as the amount of the award.⁷

In the case of one group of awards here considered, there had been a prior attempt to settle through the agency of a mixed commission. This group of claims had arisen under the first article of the Treaty of Ghent.⁸ There were questions as to the intent and meaning of that article, and the two governments, in pursuance of Article V of the Convention of October 20, 1818,⁹ referred the differences to the Emperor of Russia. The latter having decided that indemnification was due the United States, determination of the amount was left to a mixed body whose decision in all cases was to be "final

⁴ Art. XIV: "The United States do furthermore discharge the Mexican Republic from all claims of citizens of the United States, not heretofore decided against the Mexican Government, which may have arisen previously to the date of the signature of this treaty: which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the Board of Commissioners provided for in the following Article, and whatever shall be the total amount of those allowed."

Art. XV: "The United States, exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding Article, and considering them entirely and forever cancelled, whatever their amount may be, undertake to make satisfaction for the same, to an amount not exceeding three and one quarter millions of Dollars." 5 Miller, *Treaties*, 223-224.

⁵ "The United States and Spain mutually relinquish all claims for indemnity, national and individual of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

"The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article." 30 Stat. 1754, 1757-1758.

⁶ Those under the 1803 convention with France, the 1858 convention with China, and the 1901/2 protocol with China, respectively.

⁷ The Court of Commissioners of Alabama Claims.

⁸ 8 Stat. 218; 18 Stat. (2) 287.

⁹ 8 Stat. 248.

and conclusive.”¹⁰ But further difficulties arose in the execution of the 1822 convention, and Great Britain finally agreed, by the convention of November 13, 1826, to pay \$1,204,960 to the United States “in lieu of, and in full and complete satisfaction for, all sums claimed or claimable from Great Britain, by any person or persons whatsoever, under the said decision and Convention.”¹¹

Whatever the conditions under which the claimants’ government accepts liability, with or without the receipt of money, the national legislative body may require some special machinery to pass upon the individual claims and make awards. There is of course the possibility of utilizing an existing machinery, such as the Court of Claims, which functioned for the handling of spoliation claims against France.¹² It would hardly be likely that two special claims commissions would be set up under exactly the same circumstances. Any history or digest of the settlements would have to be undertaken on an individual commission basis rather than on a comparative one. Furthermore, it is obvious that, as agencies of Congress, the boards or commissions can be considered from other points of view besides that of international law. Their possible significance for that law is the sole object of inquiry here.

It is probably of less value to try to construct classifications of machineries which function for international legal purposes than to understand what the agencies actually do. One tribunal (not in the present list) which was essentially national, but which handled business that was really international in its origin, was described as “quasi-international.”¹³ In connection with one of the French spoliation claims, Judge Weldon of the Court of Claims said that, “This court in making the investigation contemplated by the act of our jurisdiction is sitting in the character of an international tribunal. . . .”¹⁴

Perhaps the most explicit statement made on the point by any of the *ad hoc* commissions under review was that by the Spanish Treaty Claims Commission (1898) as follows:

In a strictly technical sense the Commission is a national court, but in a broader sense is also international. In a very unique sense it is

¹⁰ Convention of July 12, 1822, 8 Stat. 282, 18 Stat. (2) 303.

¹¹ 8 Stat. 344, 18 Stat. (2) 308.

¹² These were claims for spoliations before July 31, 1801.

The Act of Jan. 20, 1885 (23 Stat. 283), provided that decisions of the Court of Claims should not “conclude either the claimant or Congress.” Findings as to both law and facts were to be reported to Congress as advisory for future action. In early cases under the Act, claimants sought to maintain that the Act itself constituted a pre-judgment by Congress on the validity of the claims as a class, and that the function of the court was merely to examine the particular facts and circumstances attending each claim, to determine whether it would fall within the class. But the court found that Congress had intended to submit the basic question involving the validity of all the claims as a class. George A. King, “The French Spoliation Claims,” this JOURNAL, Vol. 6 (1912), pp. 359-380, 629-649, 830-857.

¹³ Otto Schoenrich’s Report of the Nicaraguan Mixed Claims Commission to the Secretary of State of the United States (1915), p. 28.

¹⁴ *The Ship Rose v. The United States*, 36 Ct. Cls. 290, 302 (1901).

intimately related to both. If not distinctly incorporated in the Federal judicial system, it will not be denied that the organic act (March 3, 1901) and the amendatory act (June 30, 1902) confer upon the Commission all the powers of a Federal court necessary to the investigation and *adjudication* of the claims under the treaty of Dec. 10, 1898. Being the creature of an act of Congress, it is necessarily domestic in origin, and being constituted exclusively of individuals of one nationality, it is certainly not international in composition, and its decisions affect only the Government of its creation and composition. Back of the Act of Congress which gave it life, however, we find its conception in a treaty between two nations, and thus it came into being as a domestic creature stamped with the features of internationality.

After a close study of the act and giving to its words the broad interpretation which the generous motive behind them authorizes, we find it impossible to separate the domestic character of the Commission . . . from the international character imposed upon it by the treaty. . . .¹⁵

The same commission said that, "The exact status of the Commission . . . in jurisprudence, whether domestic or international, is by no means so important a question as the one of its powers. What it can do, rather than what we may call it, is the question of vital interest and consequence."¹⁶ Even if power is given to make awards which shall be final, this would not give further powers such as might vest in a municipal court with respect to distribution of what had been awarded. In a case which involved the scope of powers of the commission under the treaty of 1819 with Spain, the United States Supreme Court, speaking through Mr. Justice Story, held in 1828 that while the commissioners could decide with finality upon the validity and amount of claims against the United States, they could not pass upon the conflicting rights of parties to the amounts awarded. The court took occasion to say that the treaty had recognized an existing right to compensation in the aggrieved parties and "did not, in the most remote degree, turn upon the notion of a donation or gratuity."¹⁷

The position assigned to a commission in relation to a diplomatic agent may affect its power. In the case of the earliest commission here considered (that under the 1803 convention with France) there was disagreement between the members and the American Minister to France (Livingston) as to the commissioners' powers. The Minister seems to have taken the position that Article X of the convention left final decision of claims with the French Government, and that the commissioners should defer to the American

¹⁵ *United States-Spanish Treaty Claims Commission* (Washington, 1904-1910), Vol. VII, Opin. No. 33, p. 3.

¹⁶ *Ibid.*, p. 4.

¹⁷ *Comegys et al v. Vasse*, 1 Peters, 193, 217. The commissioners, said Story, "had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and under such circumstances, it cannot be presumed, that it was the intention of either government, to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substantial justice." (p. 212.)

Minister's constructions, at least when the latter coincided with those of the French Government.¹⁸ In the convention of November 8, 1858, China was to make payments to the United States from certain customs receipts. The distribution of the fund, by an Act of Congress of March 3, 1859, was left to two commissioners, whose awards were to be submitted, for approval, to the American Minister in China.¹⁹

The idea that the United States accepts money in satisfaction of the claims of its nationals as a trust fund, and that there are legal restrictions upon what the Government can do with the money, appears in the records of more than one of the domestic commissions. In one instance it came up in connection with the effect, upon discharge of the trust, of the other government's failure to furnish the documents needed in order to settle a claim under an earlier treaty between the parties. The convention involved was that of February 7, 1834, with Spain. By the third article, the United States confined its renunciations to a designated period of time, namely, that since February 22, 1819. The commissioner who functioned under the 1834 convention and under the Act of June 7, 1836,²⁰ undertook to justify his consideration of some unsettled claims which should have fallen under the 1819 treaty with Spain (which claims he was presumably not authorized to consider because they arose prior to 1819) by pointing out that Spain had obligated herself to produce documents upon which these claims were based, and that she had not done so. He added:

. . . as Spain obligated herself to the United States by the 11th article of that Treaty [1819], to furnish the documents and elucidations, when properly demanded, which should be necessary for the adjustment of these claims by the Florida Board; the failure on her part to furnish them, whereby the claims were rejected, was considered as constituting a valid reclamation against her on the United States, as a *Trustee for and in behalf of these very claimants*. The fund obtained under the Convention of Feb'y. 1834 was given by Spain in part to remunerate the losses occasioned by her breach of the 11th Article of that Treaty. These claimants were the aggrieved parties, and to the extent of their losses the equitable owners of said fund. The right of reclamation for this breach accrued to the United States, since the 22nd of February, 1819, and enured to the benefit of these claimants as rightful participants of the fund. . . .²¹

Another occasion for stating the idea of trusteeship came under the 1826 convention with Great Britain. In deciding some of the claims it was neces-

¹⁸ J. B. Moore, *International Arbitrations*, V, 4440 *et seq.*

¹⁹ 11 Stat. 408. In fact, the commissioners (a United States consul at Ningpo and a former vice-consul at Hong Kong) agreed upon awards in most of the cases and the American Minister to China approved each joint report made. J. B. Moore, *International Arbitrations*, V, 4628.

²⁰ 5 Stat. 34.

²¹ MS. Report of Commissioner, 1838. Where there are references, in the following pages, to commission materials without citation of printed sources, the references are to manuscript records in the National Archives.

sary to pass upon the admissibility of hearsay evidence from slaves. This furnished opportunity for Mr. Commissioner Seawell to emphasize the capacity in which the United States had received the funds, as affecting the manner in which it should be disbursed. He said:

... as to the objection that it is the hearsay of *slaves*, that is not true. G B has made them free British Subjects. They are good witnesses in a British court, against a prince of the Royal blood. *She* has made them witnesses, competent to testify in all her courts, and cannot therefore object to their completion, any more than to their religion, or forms of worship. It therefore, to my mind, is clear, that as regards G. Britain, the evidence is admissible under any form of the objections. Then how is the case altered by the Convention of London 1826? The sum paid by G B is in the hands of the U States, as the trustee for the claimants—the United States cannot rightfully pocket one cent. *She* received it in the *character* of trustee, and must pay it to those entitled by the *agreement* under which it came to her hands, or must restore it—*She must not disappoint the purpose of G Britain.*²²

In at least one instance the United States did actually return part of the funds that had been collected. This was a sequel to the convention of 1858 with China. That country, while not making any express acknowledgment of liability, agreed that the United States should receive a lump sum in settlement of claims of United States citizens. The amount, 500,000 taels (\$735,238.97) was to come from duties collected on American goods and from American vessels at three treaty ports. The two-member commission appointed under the Act of March 3, 1859,²³ awarded \$489,187.95. The balance was offered to China and, when that country refused it, was invested in United States Government bonds. From time to time the Secretary of State paid out additional money against the fund, the total being \$281,319.64. Other agencies reviewed some of the decisions. Congress referred the claim of one group of dissatisfied Americans to the Court of Claims, which, in a decision later affirmed by the Supreme Court, awarded more than twice the amount which the two commissioners had seen fit to give. In another case, where the commissioners had rejected the claim and this action had received the Minister's approval, an Act of Congress referred the matter to the Attorney General, upon whose recommendation the parties received, inclusive of interest, \$38,242.53. Two Presidents (Buchanan and Lincoln) made suggestions in annual messages that the remainder of the fund be used for some benevolent purpose in which the Chinese might be especially interested. Lincoln proposed that, if this should not be done, the money might be invested for the satisfaction of claims of American citizens arising against China in the future. Finally, on April 24, 1885, acting under the direction of Congress, the Secretary of State paid the amount which had by that time accumulated in the fund, to the Chinese Minister at Washington.²⁴

²² MS. Opinions.

²³ Cited in note 19, *supra*.

²⁴ House Ex. Doc. No. 29, 40th Cong., 3rd Sess.; For. Rel., 1885, pp. 181-182; J. B. Moore, *International Arbitrations*, V, 4636-7.

For the distribution of money received from Great Britain in satisfaction of the award in the *Alabama* claims arbitration at Geneva, there were two "Courts of Commissioners." The first, set up under authorization of the Act of June 23, 1874,²⁵ made awards totaling \$9,316,125.25, for damage done by the "inculpatated" Confederate cruisers (that is, the *Alabama*, the *Florida*, the tenders of these vessels, and the *Shenandoah* after she left Melbourne, these being the vessels for whose destructive activities the arbitrators at Geneva had found Great Britain was liable). When several classes of claimants still remained, Congress passed the Act of June 5, 1882,²⁶ which re-established the court as a three-member instead of a five-member one, and conferred upon it authority to allow claims for damage done on the high seas even by "exculpated" cruisers (*i.e.*, those other than the "inculpatated" ones mentioned above) and claims for the payment of war risk premiums after the sailing of any Confederate cruiser.²⁷ Awards on claims of the first class, amounting to \$3,346,016.32 (inclusive of interest) were paid in full. Those on claims in the second class, amounting with interest to \$16,312,944.53, were handled by a *pro rata* distribution of what remained in the Geneva arbitration fund (which by 1886 amounted, with accumulations, to something over ten millions of dollars).²⁸ The Secretary of State had no power to overrule decisions of either of the Courts of Commissioners of Alabama Claims. Rendering an opinion for the first court, Commissioner Porter said:

The act of Congress has conferred on this court almost unprecedented powers, by making us judges both of the law and the facts of every case, and giving no appeal from our judgments to any other tribunal; but the court is nevertheless one, not of general, but of special and limited jurisdiction, and clearly no claimant can bring himself within this jurisdiction without an exact and faithful compliance with the terms of the act.²⁹

The first court denied a motion that was made in one case to have the tribunal state its rulings on points of law involved, so that an appeal would lie to the Supreme Court of the United States.³⁰ The scope of powers of the

²⁵ 18 Stat. 245.

²⁶ 22 Stat. 98.

²⁷ There had been some discussion in Congress of the duty of returning to Great Britain any part of the Geneva fund not distributed to private claimants. Cong. Rec., Vol. 13, Pt. III, p. 2951, Pt. V, p. 4162; J. B. Moore, *International Arbitrations*, V, 4660, 4662n. The Act of 1882 conferred upon the re-established commission a jurisdiction broader than that which the first court had thought would cover the purposes for which Great Britain supposed she was paying the money. This suggests the extent of the legal power of Congress to distribute the funds (in the absence of specific statements in the treaty as to how they shall be paid out), whatever moral obligations there be to disburse it as the other state intended.

²⁸ J. B. Moore, *International Arbitrations*, V, 4664.

²⁹ *Williams v. United States*. See *Report* cited in note 45, *infra*, pp. 30, 32. Quoted after J. B. Moore, *International Arbitrations*, V, 4649-4650.

³⁰ J. B. Moore, *International Arbitrations*, V, 4650. The commission on Spanish claims under the peace treaty of 1898 received power to certify questions of law to the United

second court was questioned before the United States Supreme Court, which, following the ruling in *Comegys v. Vasse*,³¹ found that decisions were conclusive as to the amounts due under awards, but not as to the person or persons due to receive the money.³² The mode of trial in each of the *Alabama* claims courts was somewhat more formally organized than in some of the other domestic commissions. It involved an entry by the clerk of general denial of liability of the United States. In some respects, procedural arrangements were assimilated to those of regular federal courts; rehearings, for example, were permissible on substantially the same basis as in the United States Supreme Court. The commissions had no power except at the will of Congress. That the relation of their work to that of the Geneva arbitration tribunal of 1872 was of secondary importance, as compared with the actual instructions of Congress, is suggested by the court's observation in one case that it was not known how the award at Geneva was made up.³³

The element of national bias could hardly figure in a domestic board's proceedings as it might in that of a mixed commission, but there are occasional intimations of it. The three members of the board under the 1819 treaty with Spain, for example, pointed to the delicacy of their position when they suggested in the final report that, as American citizens, "they could but sympathize with their countrymen for the injuries they had sustained in many cases, where very equivocal evidence had been regarded by the Spanish tribunals as conclusive to establish facts, which, when assumed, would fully show the propriety and rectitude of Spanish adjudication and Spanish procedure." They professed, however, in all cases to have "struggled to suppress every sentiment which citizens of a nation, the rights of whose people have been so extinguished, would naturally entertain; and, endeavoring to review these proceedings with the impartial eye of those utterly indifferent to the causes which produced them, the Commission has pursued this course."³⁴ It would appear from the language of some of the reports that the commissions felt the need of objective standards by which to make their awards. The extraordinary nature of the task assigned elicited comment from more than one of the boards. The three commissioners referred to in the preceding paragraph modestly submitted, after determining 1800 cases, "each involving many and very distinct propositions," that "In the variety, novelty and intrinsic difficulty of the multitude of questions which have been presented for the determination of this board, there exist so many causes for distrusting

States Supreme Court. This power apparently was not used. Samuel B. Crandall, "Principles of International Law Applied by the Spanish Treaty Claims Commission", this JOURNAL, Vol. 4 (1910), pp. 806-822.

³¹ Note 17, *supra*.

³² *Williams v. Heard*, 140 U. S. 529 (1891); *Butler v. Goreley*, 146 U. S. 303 (1892).

³³ J. B. Moore, *International Arbitrations*, V, 4650.

³⁴ *Ibid.*, V, 4512-3. This commission passed upon contract claims as well as injury claims, when validity of the contracts had been determined.

the correctness of its decisions, that the undersigned dare not flatter themselves they have not often erred."³⁵ Commissioners under the 1831 treaty with France characterized some of the questions handled by them as "novel, complicated and difficult"; Mr. Commissioner Kane refers to the "varying averments" of more than three thousand memorials.³⁶ The commissioner functioning under the 1834 (Van Ness) convention with Spain reported at the end of his labors that "every imaginable shade of grievance and injury," whether springing from contracts, spoliations or the enforcement of Spanish municipal laws, had been presented. In passing upon them he had taken as "guides to a right judgment, the law of nations, the stipulations of treaties between the United States and Spain, & the Correspondence between the two Governments which led to the conclusion of the convention, as far as they were applicable to the cases before him, and never permitted himself to range in the wide field of unrestricted opinion."³⁷

In what seems to have become a standard formula for such purposes, a number of the domestic commissions were directed to make awards according to justice, equity, the law of nations, and the pertinent conventions.³⁸ In one instance the rules to be applied were those in an earlier, unratified convention (the first and fifth articles of the 1843 convention with Mexico, to which the Treaty of Guadalupe-Hidalgo refers). This provided for settlements upon the "principles of right and justice," of which language the commission said that, ". . . as we understand the terms are equivalent to a broad equity, taking into consideration all the circumstances of the case."³⁹ In specific cases, this commission emphasized that it was guided by international law.⁴⁰ But this did not convince everyone of the soundness of its conclusions. A select committee of the Senate investigated the work, inquiring into whether any part of the three and a quarter millions of dollars had been paid out on spurious, fraudulent and fictitious claims. The committee reported in 1854 that, while in general the commissioners had exhibited "decided ability," there had been irregularities in the proceedings "scarcely compatible with a judicial inquiry." It noted palpable carelessness and neglect,

³⁵ J. B. Moore, *International Arbitrations*, V, 4511.

³⁶ John K. Kane, *Notes on Some of the Questions decided by the Board of Commissioners under the Convention with France, of 4th July, 1831* (1836), p. 107.

³⁷ MS. Report of the Commissioner, 1838.

³⁸ See, for examples, the statutes for the Danish claims commission, the commission under the 1831 convention with France, and the Neapolitan and Peruvian claims commissions, respectively. By Art. I of the Peruvian convention, the distribution was to be "in the manner and according to the rules that shall be prescribed by the Government of the United States." The Act of Aug. 8, 1846, directed that adjudications be in accordance with "the principles of justice, equity, and the law of nations, and the stipulations of the convention." 9 Stat. 80.

³⁹ MS. Opinions, III, 1174. The commission's report is printed in Sen. Ex. Doc. No. 34, 32nd Cong., 1st Sess.

⁴⁰ See, for examples, decisions on the claims of Thomas Morison (Ops., I, 177), the Schooner Susan, J. W. Zacharie (Ops., I, 452), and Alexander J. Atocha (Ops., II, 604).

especially in the handling of the claims of Gardner and Mears.⁴¹ This was not equivalent to a general condemnation of the commission; one authority believes, on the contrary, that the results of the investigation "remarkably vindicated the commission."⁴²

The history of the Neapolitan indemnity reveals that a basic legal question (of governmental succession during the period of the Napoleonic wars) had been dealt with by diplomacy before the claims settlements were actually effected, a fact which might make it less necessary to instruct the commissioners to apply international law.⁴³ Sometimes the statutory instructions have been very broad. According to the Act of June 23, 1874,⁴⁴ the Court of Commissioners of Alabama Claims was to decide "in conformity with the provisions hereinafter contained, and according to principles of law and the merits of the several cases." In a case involving the measure of damages for goods destroyed, the court said that "... the restrictive clauses of the act were, so far as they apply to goods, intended and most carefully adapted to declare the law upon this branch of the subject, and not to make any new rule."⁴⁵

The idea of public duty appears in various forms in the jurisprudence of the domestic boards. A suggestion of the positive legal obligation of the United States to disburse *all* of the money which it had received in trust, and of the undesirable political effects of a different policy, occurs in a communication dated February 2, 1852, from George P. Fisher, Commissioner to adjust claims against Brazil under the convention of 1849, to Mr. Webster, Secretary of State. Envisaging an extension of the statutory time limit for his work, Mr. Fisher pointed to the probability that on the date originally set as the limit, nearly one-half of the fund would remain undistributed. He added:

Should the commission then be closed with this state of things existing, I need not hint at the seemingly awkward position our government would occupy towards that of Brazil, having distributed but little more than one-half of the sum demanded and received of her as indemnity for

⁴¹ Rep. Com. No. 182 (Senate), 33rd Cong., 1st Sess. It had been charged that in the Gardner case, more than half a million dollars had been awarded upon a "mere assertion" of title. An account of the indictment of claimants in the mentioned cases, and of the civil action in which the United States recovered about \$250,000 of the amount that had been paid on the Gardner claim, is in J. B. Moore, *International Arbitrations*, II, 1255 *et seq.*

⁴² J. B. Moore, *International Arbitrations*, II, 1263.

⁴³ A history of these claims is in Paul Christopher Perrotta, *The Claims of the United States Against the Kingdom of Naples* (1926). The "principles" which the commissioners adopted are printed in Marjorie M. Whiteman, *Damages in International Law* (1937), II, 1222-1223. In these there is no mention, in terms, of international law. That law is apparently referred to in connection with "illegal capture and condemnation."

⁴⁴ Note 25, *supra*.

⁴⁵ *Report from the Secretary of State with Accompanying Papers Relating to the Court of Commissioners of Alabama Claims* (Report of John Davis, Clerk), Sen. Ex. Doc. No. 21, 44th Cong., 2nd Sess., p. 70.

wrongs and injuries committed upon our citizens. It is manifest that those citizens will have to sustain loss against which they could not provide, owing to the circumstances which have transpired within the long period of time during which negotiations have been pending; while the government of Brazil will, at the same time, have apparent cause to complain of injustice suffered at our hands: and so long as that cause shall continue to exist, that government cannot fail to regard every claim hereafter to be made upon it by the government of the United States with that prejudice which the recollection of past injustice must naturally engender.⁴⁶

"Natural justice" was invoked in argument before the commissioners under the 1858 convention with China in an alleged piracy case, which involved the responsibility of a state in an *imperium in imperio* in the Orient; the board members disagreed on the amount of the award.⁴⁷ As to another group of claims they said that "American citizens were obliged to leave Canton and Whampoa to save their lives from the indiscriminating fury of the populace supported by the Authorities and the claims of American citizens . . . therefore appear to be good whether considered from a *municipal* or *international* point of view."⁴⁸

To do justice and equity was the professed aim of the commissioner dealing with claims under the 1834 Spanish convention, "where he was not too strongly bound by the law of the case." He reported the "outline of principles" which guided his determinations. Among other questions on which he expressed an opinion was that of the failure of claimants to take appeals to higher Spanish courts, his conclusion being that it would not be an absolute condition of his hearing the claims that the claimants should have appealed

⁴⁶ House Ex. Doc. No. 75, 32nd Cong., 1st Sess., p. 3.

⁴⁷ These were the Caldera claims. The place of the injury was allegedly within Chinese jurisdiction. The 1844 treaty of peace, amity and commerce with that country contained the following, in Art. XXVI: ". . . if the merchant-vessels of the United States, while within the waters over which the Chinese government exercises jurisdiction, be plundered by robbers or pirates, then the Chinese local authorities, civil and military, on receiving information thereof, will arrest the said robbers or pirates, and punish them according to law, and will cause all the property which can be recovered, to be placed in the hands of the nearest consul, or other officer of the United States, to be by him restored to the true owner. . . But if, by reason of the extent of territory and numerous population of China, it should, in any case, happen that the robbers cannot be apprehended, or the property only in part recovered, then the law will take its course in regard to the local authorities, but the Chinese government will not make indemnity for the goods lost." (4 Miller, *Treaties*, 568.) Mr. Roberts, with whose opinion the Minister agreed, did not find in this treaty a means of escape from public liability in these cases. As to the existence of Chinese authority in the district, he said: "If we regard the subject from a point of view under International Law we shall find that the Piratical state of Kulan was within the jurisdiction of China & the Chinese Government is responsible for its condition, although the piracy was not directly an Act of the Chinese Government or adopted by it in a direct manner." MS. Opinions, pp. 17-18.

⁴⁸ Final Report of Jan. 13, 1860. Italics inserted.

to the highest courts to which they could have gone. As to the proceedings of the Spanish courts in general, he said:

Cases did sometimes occur, although rarely, where the proceedings of Spanish Courts were marked by a just regard to the claims of humanity and public law. These exceptions established the propriety inculcated by the principles of international law of confiding in the decisions of the legitimate prize Tribunals of Spain, where nothing appeared to impugn them for palpable errors of law or fact.—But where it appeared, that there had been “a refusal of Justice—palpable and manifest injustice, and a gross violation of forms,” in cases involving little doubt, those decisions were regarded only as colourable, and the case as thrown open for a full investigation upon its merits.⁴⁹

Since many of these claims grew out of public action in periods of hostilities, the judges often had occasion to pass upon the lawfulness of governmental action in war, such as the confiscation of private property.⁵⁰ The latest Spanish commission rejected claims growing out of the sinking of the *Maine*. In cases involving damages at the hands of insurgents they applied the now familiar rule concerning due diligence.⁵¹

With impressive frequency the commissions profess that their intention is to compensate for actual losses, not prospective profits and speculative damages.⁵² Sometimes the jurisdiction of the awarding agency in this

⁴⁹ List of Awards and Report of the Commissioner, 1838.

The conclusion as to exhaustion of local remedies through appeal may be compared with what was done by the British Claims Commission under the Treaty of May 8, 1871. That international tribunal, while holding sufficient in several cases the reasons for non-appeal to American prize courts, carefully considered the reasons in each of these. J. B. Moore, *International Arbitrations*, III, 3157–3159.

⁵⁰ In the claim of A. S. Wright, the Mexican Claims Commission said: “By the law of nations Mexico had an undoubted right not only to require the removal of American citizens who were found residing in her capital, after the commencement of War between the two countries, but also to confiscate their property found within her dominions. . . . By the Treaty of April 5, 1831, Mexico agreed to a restriction of this right. . . .” (MS. Opinions, I, 345).

⁵¹ See Haig Silvanie, *Responsibility for Damage by Insurgent Governments* (1939), p. 135.

⁵² Illustrated in the work of the commission under the 1831 convention with France. Commissioner Kane (*Notes*, cited in note 36 *supra*) admitted that this policy of the board was influenced by the fact that the fund was smaller than the amount of awards. The amount available was found to be 59.8671% of that allowed.

See also, on the principal point, the report of Commissioner Henry on claims under the 1834 Spanish convention. J. B. Moore, *International Arbitrations*, V, 4542–4548.

The Attorney General handling Peruvian claims thought it consonant with equity and justice to limit awards to actual losses. See Claims Nos. 11, 14, 24 and 26. In the first of these, the commissioner said that “This rule is uniformly adhered to by the Courts of law in the investigation of similar questions, and in my judgment it is entirely consistent with justice and equity, among the respective claimants to apply it in the adjudication of these claims.” (Record of Proceedings, pp. 53–54.)

The method of measuring death damages applied by the commission under the 1901/2 protocol with China seems similar to that used by the later (international) German-American Mixed Claims Commission. See, for examples, Awards Nos. 158, 162, 167, and Final Report of the Commissioners, pp. 10, 11. Despatches, China, Vol. 121 (1902).

matter was closely circumscribed by treaty. This seems to have been especially true, for example, of the Attorney General's competence under the Peruvian claims agreement.

In the matter of adjective law, the domestic commissions were commonly allowed considerable discretion. Their rules are sometimes compared with those of municipal courts. Thus a member of the commission on claims against Great Britain under the 1826 convention suggested that that body did not follow the same "technical niceties" as would a municipal court.⁵³ Civil law rather than common law rules were considered applicable when the claim was against a country whose jurisprudence was based on the civil law.⁵⁴ In one case before Commissioner Fisher there was offered in evidence, in connection with a claim against Brazil, a paper which he found would not be receivable as evidence in the courts of the United States or England, but would be admitted in Brazilian courts according to civil law principles; the commissioner therefore made no objection to its reception.⁵⁵

One commission found that in a claims case the foreign government had sent fraudulent evidence, and that the claimant had, at the expenditure of

⁵³ From the manuscript opinion of Mr. Seawell, on the subject of hearsay evidence: ". . . according to the opinion I have formed of the functions of this Board, I have believed that it was not to be bound, either by the Convention of St. Petersburg, or of London, or Act of Congress, as to be confined in the admission of testimony, to the technical niceties, which prevail in the Courts of common law . . . this board is not constituted, as Courts of common law are . . . but is merely *temporary*,—to decide only the claims under the Imperial award, that it must be understood to have been the design of those who gave it existence, that the board was to decide according to the evidence which the transactions were susceptible of and to leave the commissioners at liberty to decide upon such facts and circumstances as satisfied their *consciences*, without being restricted by common law technicalities."

Dissenting on a point, Mr. Cheves, of the same commission, said, on the subject of suppressed testimony and rules governing the commission: ". . . what is necessary in the Courts of the United States in cases in Equity or Chancery may depend, according to circumstances, on the laws and rules of practice of each of the Twenty four States of the Union. . . . Which of all these is to be our guide and how are we to ascertain what is prescribed by them? If the Chancery practice is to have the dignity of affiliation, we can hardly be allowed to prefer that of the English Courts to that of the Courts of the United States; and if we adopt the latter it presents us the Augean Stable of all the Courts of Chancery in all the States of the Union, to select from; or perhaps, we may be bound to embrace all, if witnesses should be found in all. They are all alike recommended to our adoption, unless some should be entitled to a preference by their superior wisdom or fitness, but who is to determine this point? None can be regarded at all as *authority*. 'The essential rules of evidence' belong to all Tribunals, as they do to 'all nations governed by reason,' but 'technical Rules may infinitely vary' . . . They do infinitely vary. . . ." (MS. Opinions, pp. 12-13.)

⁵⁴ Passing upon the sufficiency of proof in the claim of Edmund I. Forestall and others for the seizure and confiscation of the *Schooner Felix*, the commissioners under Art. XIV and XV of the Treaty of Guadalupe-Hidalgo said: ". . . the Board does not feel restrained by the rules of evidence observed in courts of common law jurisdiction from considering the fact as proved here which it thus appears was proved to the satisfaction of the Court in Louisiana." (MS. Opinions, I, 119.)

⁵⁵ Letter Book of the Commissioner, p. 63.

much money, proved the falsity of the evidence. The board observed that, "Under circumstances like these disclosed . . . we cannot doubt that a Court of Chancery would set aside awards, or other legal proceedings between parties, and order a new trial of the whole case—but we have no such power." Their action was to declare responsibility and allow the claim.⁵⁶

The derivation of rules by analogy from private law, within limits, is apparently not beyond the powers of typical domestic commissions. In a case before the commission under the 1826 convention with Great Britain, involving a claim for loss due to destruction by accident, Mr. Cheves, Commissioner said:

. . . It is contended that destruction by *accident*, is not within the intention of the Treaty and the subsequent instruments which govern the decisions of this Board. This as a general principle is not denied. But if it shall appear to have been caused by gross default or by positive acts of culpable conduct I shall entertain no doubt of the Claim being a well founded one. If the transaction were one between individuals it would be governed by the law of Bailments; and cases between nations are not unusually illustrated and decided by the rules that govern individuals under like circumstances. It is true, that cases between individuals are often governed by laws of positive institution, neither the reasons nor sanctions of which can be applied to nations. In all such cases it is admitted they form no rule. But the law of Bailments, as a general doctrine, in which sense alone shall it be applied in this case, is one drawn directly from the fountains of principle and reason. It was the law of Rome and is that of England, France, Germany, and, I believe, every other civilized nation with which we have commercial or political relations. It is indeed a law of nations governing the municipal concerns of almost all nations, varied only as our erring reason happens to vary the application of the same rule.⁵⁷

Questions arose for the Court of Commissioners of Alabama Claims concerning the applicability for their purpose of rules commonly followed by prize courts. Matters of transfer of title and of mortgagees' interests will illustrate. The board held that a simulated transfer (from American ownership, of a ship that was later captured) when understood by both parties to be done merely as a cover to avoid capture, to mislead and elude a Confederate cruiser, was not such a title as would divest the original owners of their interest, and that the doctrine of estoppel could not apply so as to keep an American from bringing such a claim. In any case, as mortgagee, the claimant had a valuable interest. While counsel for the United States adduced a number of decisions to support the proposition that prize courts look with disfavor on mortgagees and other beneficial interests set up to captured property, the court observed that this was because the prize courts could not stop to investigate all the niceties and beneficial interests in captured property. It added:

⁵⁶ This was the commission referred to in note 54, *supra*. See MS. Opinions, II, 866, 870.

⁵⁷ MS. Opinion in the Louisa C. Shaw claim, pp. 1-2.

It is not because the admiralty courts have any spite against mortgagees *per se*, but because it would be impossible to preserve the old landmarks of the prize-court system, and to preserve and enforce the laws regulating capture, if the prize-courts had to take cognizance of and settle vexed questions of equitable interests constantly arising. But the same reason does not apply in this court. Because prize-courts eschew discrimination between absolute ownership and mortgages and equitable interests, is no reason why this court should look on them with disfavor or impatience. There is no reason why this court should adopt, as the standard of its duty or the measure of its generosity, the principles by which prize-courts regulate their action on the subject of mortgage.

We do not think we should do strict justice to those persons whom it was the purpose of Congress to relieve, by adhering technically to the principles governing the admiralty courts, whether by "instance" jurisdiction in time of peace, or "prize" jurisdiction in time of war. While keeping within the limits of "the principles of law" in admiralty, wherever applicable, we are constantly in danger of insensibly falling into the rigid technicality, which is inevitable for their guidance in courts of admiralty. In cases arising before such courts there are individual parties litigant, whose conflicting rights have to be protected and adjudicated. In prize-courts the rights of captors have to be protected; and behind all personal rights involved there are certain great elementary principles of sectional policy and sectional interests that every maritime and commercial country must scrupulously guard and maintain.⁵⁸

The boards naturally had to settle many questions relating to the nationality of persons. In general, the arrangements were designed to benefit United States citizens. Typical is the statement in the report of the commissioners under the 1831 convention with France, that "the relief provided for under the Convention could be awarded only to American Citizens."⁵⁹ The board handling Mexican claims decided in several cases that, in order to come within the meaning of the treaty, the claim must have been American in its origin as well as at the date of the treaty.⁶⁰ It disallowed the claim of one who, by accepting a commission and serving in the Mexican army, had "for the time being at least" lost his American citizenship.⁶¹ Another claimant who had departed from the United States for Texas and settled in that country *animo manendi* was found to have divested himself of his American nationality, it not being necessary (to that result) that he should have taken an oath of allegiance to Mexico or have remained in Texas for any specified length of time. The fact that he did afterward return to the United States and resume residence, thus reacquiring his rights as well as the character of an American citizen, did not change matters for the purpose of his claim. Citing Kent's *Commentaries* in support, the court declared that this "princi-

⁵⁸ Report cited in note 45, *supra*, pp. 100, 101.

⁵⁹ Report of Dec. 30, 1835, to the Secretary of State.

⁶⁰ The decision in the claim of Guilford D. Young (MS. Opinions, II, 697, 699) is illustrative.

⁶¹ *Idem*.

ple of the law of nations" applied "as well to a settlement in a friendly country as in an enemy's." ⁶²

The two members composing the commission on Chinese claims under the 1858 convention thought they were not authorized to accept, in proof of citizenship, any less evidence than that prescribed by the Department of State to consular officers for the granting of passports. Although "untoward circumstances" had deprived a naturalized citizen of the "muniment" of his claim in the form of his naturalization certificate or a certified copy thereof, the fact that he could not produce the evidence was fatal to his petition.⁶³ In behalf of another claimant it was submitted that, while by birth a British subject, he was "by domicile, Service of State offices, and oath of allegiance and renunciation of all foreign allegiance, a Citizen of the United States, although not naturalized as such." The individual claimed citizenship on the ground that the Postmaster General had appointed him on January 11, 1850, to the office of postmaster at Spring Creek, Texas, and that he had declared his intention to become a citizen on May 29, 1851, but the commissioners thought that "no Act of Congress nor the rulings of our courts recognize it as having any possible bearing on the subject." Even if he could have proved declaration of intention (as he apparently could not) his removal to China would have caused his imperfect claim to citizenship to lapse, for the court thought that "the character that is gained by residence ceases by non-residence," as when the person leaves without intention of returning.⁶⁴

Perhaps the most liberal rulings in this matter applied by any agency in the list were those of the Court of Commissioners of Alabama Claims. The Act of June 23, 1874, provided that ". . . no claim shall be admissible . . . arising in favor of any person not entitled, at the time of his loss, to the protection of the United States in the premises, nor arising in favor of any person who did not at all times during the late rebellion bear true allegiance to the United States." The court construed this to embrace all persons, native born or foreign born, naturalized or unnaturalized, who were receiving the protection, with the exception of British subjects. Quoting Vattel (than whom, it said, "Christendom recognizes no higher authority") ⁶⁵ and Chancellor Kent,⁶⁶ the tribunal applied the "principle of international law" recog-

⁶² Claim of Thomas Powell, Escambia (MS. Opinions, I, 294-295).

⁶³ Opinion on the claim of W. W. Robinet and Company.

By the rules of the Court of Commissioners of Alabama Claims, if claimants were naturalized citizens, authenticated certificates of their naturalization were to be appended to their petitions. (Report cited in note 45, *supra*, p. 131.)

⁶⁴ Opinion on the claim of George M. Ryder and his nationality.

⁶⁵ *Le droit des gens*, Bk. 2, Ch. 8, Sec. 104.

⁶⁶ *Clarke v. Morey*, 10 Johns. 68, 71 (1813): ". . . by the law of nations, an alien who comes to a foreign country is entitled so long as he conducts himself peaceably, to continue to reside there, under the public protection. . . . And it has now become the sense and practice of nations, and may be regarded as the public law of Europe . . . that the subjects of the enemy . . . so long as they are permitted to remain in the country, are to be protected in their persons and property and to be allowed to sue, as well as to be sued."

nized as a part of the municipal law of England and the United States, to the effect that "foreigners are entitled to protection in that country in which they are domiciled or even temporarily sojourning." As to the particular case before them (the complainants in which were subjects of Portugal at the time of their losses) the commissioners said:

The public law of Christendom, and the municipal law of the land, declare that foreigners, whether domiciled or temporarily sojourning on our soil, or whether on the decks of our ships, trusting to the security of our flag upon the high seas, are equally entitled to our protection against wrong from any foreign power, and equally entitled to sue for their rights in our courts. Therefore, on the ground of abstract justice and propriety, and upon the ground of legal right, we decide that foreigners, entitled to the protection of our flag in the premises, whether naturalized or not, have a right to share in the distribution of this fund.⁶⁷

Claims of subjects of Great Britain were not receivable.⁶⁸ But in the case of one individual, not even the fact that he had applied for and been admitted to the privileges of a British subject in India brought him within the exception clause passed by Congress. He had secured no rights of a British-born subject in England, had not renounced his allegiance to his native country since his birth in Hamburg, and had acquired no right of protection from Great Britain except as to his person and property while within the jurisdiction of the colony which gave him the naturalization; he might, upon returning to his native country, have lawfully borne arms against Great Britain.⁶⁹ Under the British statute of 1847 naturalization in the United Kingdom did not confer any rights of citizenship within the colonies, nor did colonial naturalization confer any such rights beyond the limits of the colony granting naturalization.⁷⁰

The second Court of Commissioners of Alabama Claims, operating under the more liberal statute of 1882, allowed claims of British subjects serving on American vessels that had been destroyed. It also allowed them for premiums on war risk insurance of American-owned goods on British vessels, refusing to regard as controlling an analogy drawn from the Greytown bombardment cases.⁷¹

As might be expected, no uniform rule has been followed by the domestic commissions in the matter of interest. Under its "principles" of January

⁶⁷ Benjamin Worth v. United States, No. 91; Report cited in note 45, *supra*, p. 40. See also Nos. 92, 237, 246.

⁶⁸ The claim of John Burns was apparently the only one of this kind before the court. Report cited in note 45, *supra*, p. 41.

⁶⁹ Friedrich Albert Schreiber and Arnold Otto Meyer v. United States, No. 740. Report cited in note 45, *supra*, p. 111. In support of the ruling there is a quotation from Lord Chief Justice Cockburn's work on nationality.

⁷⁰ 10 & 11 Victoria, c. 83. Cf. Markwald v. Attorney General [1920] 1 Ch. 348.

⁷¹ J. B. Moore, *International Arbitrations*, V, 4672-4673. Part of the task of the second court was to define "high seas" and "Confederate cruisers" within the meaning of the statute.

24, 1835, the Neapolitan indemnity commission allowed interest at the rate of twenty per cent on amounts awarded. (The fund permitted the payment of 94.82 per cent of what was authorized.)⁷² The board which passed upon claims under the 1858 convention with China allowed twelve per cent interest on the claims from the time of their origination to the date set for filing claims, apparently having in mind the fact that some time must elapse before there could be complete collection of the indemnity (for which certain customs receipts at designated ports were pledged).⁷³ Attorney General Mason allowed no interest on awards in the Peruvian claims, holding that the sum for which the awards were compromised represented only the amounts demanded as principal.⁷⁴ The commissioner handling Brazilian claims allowed interest on an earlier claim, the principal of which had been determined in 1842 but not paid until 1846; at the same time, he refused to allow for this claimant's expenses in prosecuting the original claim, saying that this would be as dangerous as it would be new.⁷⁵ Memorialists before the commissioners under the Treaty of Guadalupe-Hidalgo sought to prove by an examination of Spanish and Mexican laws that a higher rate of interest than five per cent (which the mixed commission of 1839 had found to be the customary and legal rate fixed by the laws of Mexico, and therefore to be applied as to claims originating within Mexican territory) was allowable, but they did not succeed. In 1855 Mr. Attorney General Cushing held that Acts of Congress merely authorizing settlement of claims according to "equity" or "equity and justice" did not mean the giving of interest.⁷⁶ The Court of Commissioners of Alabama Claims allowed interest on awards at the rate of four per cent, in accordance with the specific authorization of Congress.

The foregoing discussion has referred to illustrative statements and rulings which the domestic claims commissions have made. A complete estimate of their legal work would require a much more detailed analysis of the claims decisions, with classifications of questions presented, and comparisons of the holdings with the international customary and treaty law on the points involved. Such a detailed investigation would go far beyond the scope of the present study, which has dealt with more general aspects of the commissions' work. The brief comparative view which has been undertaken may serve to emphasize some of the peculiar problems which have attended the settlements.

The plan of making awards through domestic commissions eliminates only to some extent the factors of diverse national policies, legal systems and cul-

⁷² J. B. Moore, *International Arbitrations*, V, 4585, 4587.

⁷³ *Ibid.*, V, 4629.

⁷⁴ *Ibid.*, V, 4595. The action of the Attorney General is there referred to as a "rule of necessity, not of law".

⁷⁵ *Ibid.*, V, 4614.

⁷⁶ Colmesnil's Case, 7 Ops. Atty. Gen., 523.

tures.⁷⁷ Other problems may be created, such as that of procuring from abroad the documentary materials frequently required for adequate handling of the claims. The first commission in the selected list, that under the 1803 convention with France, had occasion to see how difficult it could be to secure needed information from a foreign government. The whole history of the French spoliation claims affords convincing evidence of the difficulties. Agents visiting ports in the French and Spanish West Indies to discover places of deposit of records and to find out what records might be in existence that would have some bearing upon the rights and claims of American citizens under the Act of 1885 found, for example, that in a considerable number of cases captors had landed and disposed of cargoes without any trial whatever.⁷⁸ Particularly if a long period has elapsed between the time of origin of the claim and its adjudication, this problem may be a major one.

It has been seen that, while under general injunctions to decide according to justice, equity and the law of nations, as well as conventions that may be pertinent, the domestic boards have exercised some discretion in their application of rules. Particularly has this been true when rules of municipal law rather than international law were involved, where there was divergence as between the countries concerned, or where there was lack of definiteness. It is clear that the legislature creating a commission has the power to limit the latter by jurisdictional restrictions and by instructions, without the prospect of a foreign government's interposition. At the same time, United States practice seems to indicate an acceptance in fact of the idea of trusteeship when the Government has received funds to be disbursed in satisfaction of private claims. The possibility of the paying state's validly objecting to the manner of distribution has occasionally been suggested in the course of proceedings.

Perhaps one impression to be had from a brief survey of the development would be that of the relatively small amount of generally accepted, substantive international law, outside of treaties. Rules that were clearly established have in numerous cases received declaration and emphasis. The fact of the law's growth and development since the time of some of these applications needs to be taken into consideration in any attempt to estimate their present value as precedents.

As to the rules of adjective law, the possibility of divergence as between different commissions is apparent. If it be true that, in the matter of evidence there are not, strictly speaking, rules of evidence in international law in a general sense, but rather a general body of practice that has developed a

⁷⁷ Cf. Frederick S. Dunn, *The Diplomatic Protection of Americans in Mexico* (1933), p. 52, comparing the plan of the commission under Arts. 14 and 15 of the Treaty of Guadalupe-Hidalgo with that of the 1839 mixed commission and that projected under the unratified 1843 convention with Mexico.

⁷⁸ Sen. Ex. Doc. No. 30, 49th Cong., 1st Sess. (Report of James O. Broadhead and Somerville P. Tuck); House Ex. Doc. No. 194, 49th Cong., 1st Sess. (Report of Somerville P. Tuck.)

high degree of uniformity,⁷⁹ it is to be expected that such law as governs domestic commissions will be that of their own institution or that prescribed by the creating legislature. It is possible for the legislative body to approve the established international practice by general reference, but experience seems to indicate a tendency merely to instruct the commissioners to proceed in accordance with justice and equity.

Where there has been more than one domestic commission for the handling (at different times) of claims against the same foreign country (such as Spain) there has been some effort to relate the work of later commissions with earlier.⁸⁰ That national commissioners are likely to be aware of the possible international effects of their awards as precedents is indicated by the suggestion from the Court of Commissioners of Alabama Claims that matters before it should be handled in the light of the possibility that in some other war the United States might be a neutral.

Proceedings before domestic commissions remain distinguishable from those of purely international commissions. Commissioner Kane of the agency handling claims against France pointed out that there was no one before the board to "represent the fund."⁸¹ The commissioner for claims under the Van Ness convention with Spain observed that he was unaided by the arguments of counsel.⁸² It is true that such tribunals as those for the *Alabama* claims have been more nearly assimilated to ordinary courts. In any case, the absence of the elements commonly associated with international adjudications has not prevented the domestic commissions from making many applications of the rules of customary and conventional international law, although their authorizations to do so flow directly from national legislation rather than international agreements.

⁷⁹ Durward V. Sandifer, *Evidence Before International Tribunals* (1939), p. 334. A part of the development described in this useful volume has come since the work of the latest commission whose work has been considered in the foregoing pages.

⁸⁰ See, for example, J. B. Moore, *International Arbitrations*, V, 4543-4544.

⁸¹ Notes cited in note 36, *supra*.

⁸² Report of Jan. 31, 1838.

EDITORIAL COMMENT

WAR BETWEEN THE UNITED STATES AND THE AXIS POWERS

On Sunday, December 7, 1941—"a date which will live in infamy," Japan made a surprise attack by air bombers and submarines on Pearl Harbor, Hawaii, the largest naval base of the United States, resulting in heavy losses in men and craft to the United States. One hour later and possibly without knowledge of the attack, the Japanese Ambassador, Admiral Kichisaburo Nomura, and the Japanese special envoy, Saburo Kurusu, acting as the mouthpiece of General Tojo, the recently appointed Premier of Japan and head of the military clique, requested and obtained a conference with Secretary of State Hull and handed him the Japanese reply to the American note of November 26 last. About the time of this conference word was first received of the Japanese attack carried out thousands of miles from Japan. This conference was a continuation of the conferences begun in the early spring of 1941 at the request of Japan with the Japanese Ambassador for the maintenance of peace in the Far East, and continued and given special emphasis by the arrival on November 15, 1941, by air from Tokyo of the special envoy, Saburo Kurusu. The attack was a bold act of treachery, in the words of the President, "under the very shadow of the flag of peace borne by the special envoys in our midst" (Address of President Roosevelt, December 9, 1941). The whole affair was a pretense of sincere diplomatic negotiations by Japan with the victim she had long before marked out for assault.¹ In the President's message to Congress of December 8, 1941, he described the situation as follows:

The United States was at peace with that nation [Japan] and, at the solicitation of Japan, was still in conversation with its Government and its Emperor looking toward the maintenance of peace in the Pacific. Indeed, one hour after Japanese air squadrons had commenced bombing in Oahu, the Japanese Ambassador to the United States and his colleague delivered to the Secretary of State a formal reply to a recent American message. While this reply stated that it seemed useless to continue the existing diplomatic negotiations, it contained no threat or hint of war or armed attack.²

It will be recorded that the distance of Hawaii from Japan makes it obvious that the attack was deliberately planned many days or even weeks ago. During the intervening time the Japanese Government has

¹ "Japan in its recent professions of a desire for peace has been infamously false and fraudulent. . . ." Secretary Hull, State Dept. Press Release, Dec. 7, 1941.

² The note was, however, bristling, if not hostile, in tone and content: "It is presumed the above provision [of the American proposal] has been proposed with a view to restrain Japan from fulfilling its obligation under the Tripartite Pact when the United States participates in the war in Europe and as such it cannot be accepted by the Japanese Government." Compare the action of Japan in beginning the war with Russia in 1904. Hershey, *International Law and Diplomacy in Russo-Japanese War*, Chap. I. It is reported the Secretary of State as early as Nov. 27, 1941, warned other Departments of the Government of the possibility of an outbreak by Japan in some direction.

deliberately sought to deceive the United States by false statements and expressions of hope for continued peace.

This aspect of the outbreak without warning, with consummate duplicity, is treated elsewhere in this issue. It is only necessary to refer to a few statements of authorities on international law to show that the attack by Japan was a gross violation of the principles of honor and good faith demanded by international law.³

The attack by Japan was followed by a declaration of war against the United States and Great Britain on December 7, 1941. United States and Great Britain replied in kind on December 8, 1941. In sequence came the declarations of war against the United States by Germany and Italy on December 11, 1941.⁴ On the same day the United States and Great Britain replied by declarations of war. On the same day also, Germany, Italy and Japan signed a military alliance for the joint conduct of the war and a guaranty not to make a separate peace or truce. This alliance is to remain in force as long as the Tripartite Pact of September 27, 1940, which it is designed to carry out.

The relations of the United States with Japan had progressively deteriorated since her war with China began in July, 1937,⁵ just as had the relations

³ John Bassett Moore, the dean of international jurists, says, "Although a contest by force between nations may, no matter how it may have been begun, constitute a state of war, it by no means follows that nations, in precipitating such a condition of things, are not bound by principles of honor or good faith. If, for example, a nation, wishing to absorb another, or to seize a part of its territory, should, without warning or prior controversy, suddenly attack it, a state of war would undoubtedly follow, but it could not be said that the principles of honor and good faith enjoined by the law of nations had not been violated. . . . Nor is the practice of fraud and deceit permitted by a state of war supposed to be admissible in time of peace." (7 Moore, *Digest of International Law*, 171.)

Professor Fenwick states: "A sudden attack by one state on another before negotiations looking to a settlement of the controversy have been undertaken or have reached the point where the redress demanded is apparently not to be granted, has been regarded from the earliest times as an act of international brigandage." (*International Law*, p. 453.)

As to treachery, see G. G. Wilson, *International Law Situations*, 1917, p. 161; Amos S. Hershey, *International Law and Diplomacy of Russo-Japanese War*, Chap. I; Oppenheim, *International Law*, 3d ed., p. 311, Charles Noble Gregory, *Proceedings of the American Society of International Law*, 1921, p. 115.

Warning as to war is required before the commencement of hostilities by Hague Convention III of 1907, which was signed and ratified by all of the main belligerents in the present war, including Germany and Japan, but excluding Italy.

⁴ Dec. 7, 1941, declaration of war against Japan by Canada; Dec. 8, by Honduras, El Salvador, Guatemala, Haiti, Dominican Republic, Holland, Greece, Free French and Panama; Dec. 9, by Australia, South Africa, New Zealand, China, Cuba, Costa Rica; Dec. 11, by Poland. For other declarations of war see State Department Press Releases, Dec. 15 and 18, 1941.

⁵ A review of the treaty evasions and breaches on the part of Japan and her ties with the Axis Powers and her diplomatic exchanges with the United States while carrying on her aggressive policies in Asia, will be found in President Roosevelt's report to Congress with attached documents, dated Dec. 15, 1941, reprinted in this JOURNAL, Supplement, p. 24.

with Germany and Italy since the war began in Europe. As both wars were of a predatory nature, to which the United States opposed a strong and consistent front, the course which led the United States finally into the war is shown by the sequence of events. However much we may agree with the general policy of the United States toward aggressors, it is interesting to the science of international law to consider the legal aspect of these events and to compare the policy and the law involved.

During the last war the United States had endeavored to maintain neutral rights. In this war neutral rights were largely waived by the so-called Neutrality Acts conceived in a policy of isolation, and then discarded frankly for a policy of belligerent assistance on the ground of self-defense against the growing world menace of the aggressors. Legally speaking, under the traditional principles of international law the United States has not been neutral as to either struggle, but has from small beginnings grown into active participation in the war, more active in the European area than the Far Eastern area. In the former, it was aiding Britain which was fighting the Axis; in the latter, it was aiding China which was fighting Japan. Beginning with protests against acts of aggression in Europe, the United States Government became a purveyor of contraband of war to the Allies on a large scale, enacted legislation to that end, furnished war vessels to Britain, opened our ports to the repair of belligerent warships, and finally became an accessory in the Battle of the Atlantic.⁶

Such warlike acts invited declarations of war on the part of Germany and Italy whenever they wished to regard them as *causae belli*. Many of these acts were reviewed in the war speech of Hitler and touched on in the German declaration of war as grounds for war:

The Government of the United States having violated in the most flagrant manner and in ever-increasing measure all rules of neutrality . . . and having continually been guilty of the most severe provocations against Germany . . . has finally resorted to open military acts of aggression.⁷

⁶ See "Government Traffic in Contraband," by L. H. Woolsey, this JOURNAL, Vol. 34 (1940), p. 498.

John Bassett Moore says, "But as the supply of arms and ammunition to a fighting force is a direct contribution to its military resources, a neutral government cannot itself supply such articles to the parties to an armed conflict, or permit its citizens to supply them to one party but not to the other, without abandoning its neutrality and making itself a party to the conflict, whether war has or has not been declared." (Foreign Affairs, July, 1933, p. 564.)

⁷ German Declaration of war, N. Y. Times, Dec. 11, 1941.

In the last war France declared war on Austria-Hungary, Aug. 13, 1914, because of "acts of military assistance given to Germany and incompatible with neutrality." (*International Law Situations*, 1917, p. 88.)

Italy declared war against Germany, Aug. 28, 1916, because of "systematically hostile acts . . . consisting in both an actual warlike participation and economic measures of every kind," mentioning the supply of arms, the participation of German officers and men and the suspension of debt payments to Italians (*Id.* pp. 171-2). (In an opinion of the German

On the other hand, the unneutral course of the United States has been justified by the Government on the ground of self-defense and fading-out of the obligations of neutrality under a modern interpretation of the Kellogg Pact and other multipartite acts tending to "outlaw" war.⁸ Of course, a disregard of the obligations of neutrality resulting in participation in the war on one side by the United States, on whatever ground or justification, requires preparation for self-defense in the eventuality that this course should bring about a declaration of war by the affected belligerents. It is therefore doubtful that these more or less reciprocal causatives lead to any logical result or conclusion.

Another feature of American policy that ought to be mentioned is the economic and financial pressure exerted by the United States on the Axis Powers, including Japan. This is in truth an example of the application to the aggressor states of measures in the nature of "sanctions".

Beginning on April 10, 1940, the freezing control of assets (including money, securities, diamonds, paintings, etc.) was begun progressively with Norway down through the list of occupied countries of Europe. On June 14, 1941, the freezing control was extended to the remaining countries of Europe, including Germany and Italy, which changed the measure from a primarily defensive weapon intended to protect the assets of the peoples of invaded countries to a frankly aggressive weapon against the Axis Powers, including their use of neutral countries as cloaks for their transactions. On July 26, 1941, when Japan overran Indo-China, the same control was invoked against Japan for the obvious purpose of curbing Japanese aggression, and against China, at her request, in order to curb Japanese activities in the occupied areas of China.⁹

The freezing control was used in conjunction with a system of export

Reichsgericht at Leipsic, shortly before the war, appears the statement: "Formally there is not a state of war between Germany and Italy, but it must be admitted nevertheless that Germany participates in the Austro-Italian War in consequence of the treaties existing between Austria and Germany. According to these treaties, in case Austria is obliged to send troops to other theaters of the war, Germany should fill the vacancies thus caused by means of proper forces." *Journal du droit international privé*. Clunet, 43:1701. (Quoted, *id.*, p. 172, note.)

Germany declared war against Portugal, March 9, 1916, for unneutral conduct, including the sale of a destroyer, guns and materials to the enemy, the extensive sojourn of war vessels in port and the seizure of German vessels. (*Id.*, p. 105.)

France declared war on Bulgaria, Oct. 16, 1915, because of the latter's military cooperation with the enemy. (*Id.*, p. 91.)

Austria-Hungary broke relations with Belgium, Aug. 22, 1914, because of the latter's military cooperation with France and Britain. (*Id.*, p. 51.)

⁸ See "The Taking of Foreign Ships in American Ports," by L. H. Woolsey, this JOURNAL, Vol. 35 (1941), p. 497.

⁹ Freezing control is based on United States Code, Title 12, Sec. 95a, and certain constitutional powers of the President. See address of Edward H. Foley, General Counsel of Treasury Department, before American Bar Association, Sept. 29, 1941.

control. This began with the "moral embargo" instituted in 1938 on exports of aircraft, aircraft parts, materials and bombs to countries bombing civilian populations. Thereafter no such exports of any account were made to Japan. Under the Export Control Act of July 2, 1940, aviation gasoline, heavy iron and steel scrap were embargoed to Japan in July, and iron and steel scrap of all kinds and equipment for production of gasoline in September. After January, 1941, none of the articles under export control were allowed to go to Japan, except low-grade gasoline, and after the freezing control was imposed in July nothing was allowed to go to Japan.¹⁰ No exports were permitted to reach the European aggressors either, but exports of all articles were free to the Allies and to China so far as they could be spared.

On July 17, 1941 a step was taken in a different direction for the same purpose. By a Proclamation of that date, President Roosevelt authorized a "blacklist" of persons and firms in American republics (and probably later in other countries), whose activities are believed to be unfriendly to American interests. It had the effect of extending the freezing control and the trade control so as to restrict any activities detrimental to the United States.¹¹

By the application of these measures several billion dollars of funds were kept from Axis hands and control to maintain their war effort, including propaganda, espionage, sabotage and other subversive activities. It effectively stopped all trade with Japan. Parallel action by the British and Dutch was a severe shock to Japanese aggression. It also effectively closed leaks in the allied "blockade." Naturally the dictator states retaliated by similar measures, although prior thereto the title to American property in Germany and Italy had been reduced by seizure and control to little more than a shell.¹²

The result of imposing these "sanctions" has been precisely that anticipated by John Bassett Moore and other jurists. Mr. Moore describes them as "war-tending and war-like processes prescribed by the Covenant, comprising 'sanctions,' boycotts and war itself" and denominates them as "war-like devices."¹³ The application of these "sanctions" to Japan undoubtedly tended to drive her into closer alliance with Germany and Italy. Moreover, the United States Government has facilitated the supply of arms, ammunition, implements of war and other contraband articles to China, has helped her with experts and advisory missions, and has also aided in furnishing credits or loans to the Chinese Government for stabilizing exchange and prosecuting the war. That no war had been declared in the Far East can hardly excuse or justify this course. As the available diplomatic correspondence

¹⁰ See President's proclamations and orders under the Act of July 2, 1940, 54 Stat., 714, and State Department Press Releases for that period.

¹¹ Address of Edward H. Foley, *supra*.

¹² *Id.*

¹³ John Bassett Moore, "An Appeal to Reason," *Foreign Affairs*, July, 1933, Vol. 11, No. 4, pp. 580, 585. See also his statement at Hearings before Senate Foreign Relations Committee on S. 3474, Jan.-Feb., 1936, p. 172 *et seq.*

shows, Japan protested against these efforts of the United States and similar efforts on the part of Great Britain. In the document handed to Secretary Hull on the day of the Japanese attack, the Japanese Ambassador asserted (with utmost hypocrisy as to Japanese aims) that

. . . both the United States and Great Britain have resorted to every possible measure to assist the Chungking régime so as to obstruct the establishment of a general peace between Japan and China, interfering with Japan's constructive endeavors toward the stabilization of East Asia. Exerting pressure on the Netherlands East Indies, or menacing French Indo-China, they have attempted to frustrate Japan's aspiration to the ideal of common prosperity in coöperation with these regions. Furthermore, when Japan, in accordance with its protocol with France, took measures of joint defense of French Indo-China, both American and British governments, wilfully misinterpreting it as a threat to their own possessions, and inducing the Netherlands government to follow suit, they enforced the assets freezing order, thus severing economic relations with Japan. While manifesting thus an obviously hostile attitude, these countries have strengthened their military preparations perfecting an encirclement of Japan, and have brought about a situation which endangers the very existence of the empire.

In conclusion he added:

Obviously it is the intention of the American Government to conspire with Great Britain and other countries to obstruct Japan's efforts toward the establishment of peace through the creation of a new order in East Asia, and especially to preserve Anglo-American rights and interests by keeping Japan and China at war.¹⁴

These views were reflected briefly in the Japanese declaration of war of December 7, 1941, as grounds for her appeal to arms.

However the historian and jurist may eventually reckon or weigh the policy of the United States leading up to the present conflict, "We are now in this war. We are all in it—all the way," as the President said. It is therefore interesting to note the aims of the belligerents, which they believe the present war will realize. It is difficult to find in the pronouncements of the Axis Powers any pledge for the peace of the world after this war, for the upbuilding of humanity, for the integrity of the individual. They only preach of a place in the sun, a *lebensraum*, a new order, a new world philosophy, which are to be brought about or imposed by force. "Two worlds are in conflict; two philosophies of life. . . . One of these worlds must break asunder." Perhaps the preamble of the Tripartite Pact which the dictators are now allied to carry out states their veiled aims as well as anything. It reads:

The Governments of Germany, Italy and Japan, considering it as a precedent to any lasting peace that all nations of the world be given each its own proper place, have decided to stand by and coöperate with

¹⁴ The full text of the Japanese document, as well as the text of the last American document handed to the Japanese envoys on Nov. 26, 1941, are printed in this JOURNAL, Supplement, pp. 44, 50.

one another in their efforts in greater East Asia and regions of Europe respectively wherein it is their prime purpose to establish and maintain a new order of things calculated to promote the mutual prosperity and welfare of the peoples concerned.¹⁵

This was substantially repeated in Article III of the Alliance Agreement. Implicit in this pronouncement and explained in other statements and particularly in the actions of the dictators, is the plan to establish and maintain by force a hegemony in Europe and Asia around which other states shall revolve as satellites held in place by the magnetic superiority of race.

In contrast, witness the objectives of America, which place freedom as the goal of the war—freedom of the individual, freedom of trade, freedom from invasion and war. The Atlantic Charter signed by President Roosevelt and Prime Minister Churchill is a succinct statement of the war aims of America and Britain.¹⁶ It is unnecessary to summarize them here, but it may be said that they are truly magnanimous and democratic and are dedicated to protect and foster "life, liberty and the pursuit of happiness"—the polar opposites of the Axis aims. They are avowed again in the preamble to the Declaration by United Nations, a military alliance of 26 nations, including the United States, signed on January 2, 1942. These nations unite in subscribing to the "purposes and principles" of the Atlantic Charter and in proclaiming that they are "convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world."¹⁷

L. H. WOOLSEY

LAW IN WAR

Is war today conducted more humanely than when Joshua is said to have destroyed Jericho, sparing only Rahab and her household because of her services to his spies?¹ There is reason why it should be. Joshua acted according to his lights. Today, according to the Rules of Land Warfare

¹⁵ This JOURNAL, Supplement, Vol. 35 (1941), p. 35.

Secretary Hull has stated the meaning of the "new order" as follows: "Previous experience and current developments indicate that the proposed "new order" in the Pacific area means, politically, domination by one country. It means, economically, employment of the resources of the area concerned for the benefit of that country and to the ultimate impoverishment of other parts of the area and exclusion of the interests of other countries. It means, socially, the destruction of personal liberties and the reduction of the conquered peoples to the rôle of inferiors." (New York Times, Jan. 16, 1941.)

¹⁶ This JOURNAL, Supplement, Vol. 35 (1941), p. 191.

¹⁷ New York Times, Jan. 3, 1942.

¹ "And they utterly destroyed all that was in the city, both man and woman, young and old, and ox, and sheep, and ass, with the edge of the sword. . . .

"And Joshua saved Rahab the harlot alive, and her father's household, and all that she had; and she dwelleth in Israel even unto this day; because she hid the messengers, which Joshua sent to spy out Jericho." (Joshua, VI, 21 and 25.)

applicable to the United States Army, the means (and doubtless also the ways) of injuring the enemy "are definitely restricted by international declarations and conventions and by the laws and usages of war."² These are to be found in a number of places and exemplify practices that have begotten standards of conduct. With the advent of the year 1942, the international society does not admit that war once embarked upon means the exercise of unrestricted belligerent power unfettered by legal duties towards an enemy. What they involve or call for has recently been brought home grimly to the United States by the conduct of the enemy.

On December 7, 1941, a day which as President Roosevelt well said, "will live in infamy,"³ naval and air forces of Japan suddenly and deliberately attacked the United States at a time when it was at peace with that nation, and, when the United States "at the solicitation of Japan, was still in conversation with its Government and its Emperor looking toward the maintenance of peace in the Pacific. Indeed, one hour after Japanese air squadrons had commenced bombing in the American island of Oahu the Japanese Ambassador to the United States and his colleague delivered to our Secretary of State a formal reply to a recent American message. And, while this reply stated that it seemed useless to continue the existing diplomatic negotiations, it contained no threat or hint of war or of armed attack."⁴ The perfidy of the Japanese procedure, accentuated by official conduct that was incompatible with armed attack upon the United States, and which was seemingly designed to dispel the idea that such attack was, at the time, being made or about to be made, is believed to have been a violation of a legal duty to the nation.

A few weeks later, on December 27 and 28, 1941, the City of Manila was subjected to aerial bombardment despite the fact that on or about December 26, 1941, General MacArthur undertook to make it clear to the enemy that Manila had been made an "open city." It is understood that he did so by removing or destroying all possible military objectives, and by making it obvious that there remained therein no legitimate objective which the enemy could thereafter properly attempt to bombard from the air in case its aircraft gained access to the airspace over that city.⁵ The announcement was simply a mode of apprising the enemy of a fact which when known to him demanded respect for the consequences of it.⁶ The ensuing bombardment

² 1940 edition, No. 26.

³ President Roosevelt, War Message to the Congress, Dec. 8, 1941, *New York Times*, Dec. 9, 1941, p. 1, where it was added: "It will be recorded that the distance of Hawaii from Japan makes it obvious that the attack was deliberately planned many days or even weeks ago. During the intervening time the Japanese Government has deliberately sought to deceive the United States by false statements and expressions of hope for continued peace." Also in this *JOURNAL*, Supplement, p. 22.

⁴ *Ibid.*

⁵ *New York Herald Tribune*, Dec. 26, 1941.

⁶ Compare situation in Paris, referred to in communication from the American Ambassador, June 13, 1940, *Dept. of State Bulletin*, June 15, 1940, p. 646.

of Manila did not mark an attempt to destroy legitimate objectives within a particular area with mere incidental damage to life or property in proximity thereto. It was rather a deliberate effort to destroy whatever the destroyer sought to demolish, with a possible view to terrorizing the inhabitants, and with unconcern, moreover, for the safety of churches, hospitals and the like.⁷ According to a War Department communiqué of Dec. 30, 1941:

A survey of the damage done to undefended Manila by the repeated senseless and savage bombings by Japanese aircraft after it had been declared an open city has been practically completed. This survey indicates that churches and other centers of Christian worship and culture were deliberately selected as special targets for enemy attacks. These edifices were of a distinctive type of architecture and their character could not have been mistaken. Before the brutal assaults were begun, Japanese bombing planes flew low over the city, obviously selecting the buildings which were subsequently bombed.⁸

This action by the enemy has aroused, as it should, vast indignation throughout our land and intense sympathy for the victims. It should and may kindle determination to spare no effort to prevent recurrence of kindred acts. This may test the full resourcefulness of the nation. It calls for an American achievement that shall cause the enemy to realize the dire consequences of its own lawlessness in conducting war. What has already taken place invites retribution. That should not, if possible, express itself in returning like for like, and the sacrifice of unoffending and helpless enemy noncombatants, if there be any possible alternative that can serve a like purpose.⁹ To deal with the Japanese as savages, impervious to the dictates

⁷ See views of Secretary Hull, as set forth in Associated Press despatch in New York Sun, Dec. 27, 1941, p. 1. Also United Press despatch, dated Manila, Dec. 29, 1941, in New York Herald Tribune, Dec. 29, 1941, p. 1.

⁸ Associated Press despatch, New York Sun, Dec. 30, 1941, p. 1. In this connection the War Department announced the receipt of the following radiogram from Gen. MacArthur: "Enemy mercilessly bombed the open city of Manila using sixty-three bombers. Damage has been severe and includes all types of civilian installations, such as churches, the cathedral, hospitals, convents, business and private dwellings. It is notable that before Manila was declared an open city and before our anti-aircraft evacuated therefrom he had abstained from attempted bombing of anything in Manila except military installations. His present actions can only be deemed completely violative of all the civilized processes of international law. At the proper time I bespeak due retaliatory measures." (*Id.*, p. 6.)

See also further report from General MacArthur, set forth in special despatch by Charles Hurd in New York Times, Jan. 8, 1942, p. 1.

⁹ According to War Department Rules of Land Warfare, of 1940, No. 358: "Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from illegitimate practices. They should never be employed by individual soldiers except by direct orders of a commander, and the latter should give such orders only after careful inquiry into the alleged offense. The highest accessible military authority should be consulted unless immediate action is demanded as a matter of military necessity, but in the latter event a subordinate commander may order appropriate reprisals upon his own initiative. Hasty or ill-considered action may subsequently be found to have been wholly unjustified, subject the responsible officer himself to punishment as for a violation of the laws

of civilization, would be a sad degeneration for a country which, like our own, professes attachment to the requirements of international law. What has already taken place suggests that our Government must, however, as it doubtless will, make vigorous and detailed protest, through appropriate neutral agencies, and with such precision and completeness in the light of all relevant facts, as will impregnably sustain its position and also give to the offender a full sense of both American indignation and of the character of the American demand by way of retribution.¹⁰ From us Japan must learn that the way of the transgressor is hard. If that lesson cannot be appropriately or reasonably taught by the Department of State or even through the direct operation of our military or naval forces, and remains unlearned throughout the duration of the war, retribution must be exacted at the peace conference. There should be no resumption of friendly relations with Japan until the score is cleaned. There may be various methods of cleansing. The exaction of appropriate indemnities may be one; but it will be an insufficient cleanser. By some process Japan must be made to realize that, for the kind of lapses of which it has been guilty, the bare payment of money does not suffice. Nor will mere expressions of regret, however formally expressed, be enough. In order to impress the mind of the enemy with an adequate sense of the gravity of its offenses, and to inculcate real deference for the law, it might be ultimately useful to lower the rank of diplomatic representation between the two countries, by neither accepting nor sending a diplomatic representative of higher grade than that of envoy

of war, and seriously damage his cause. On the other hand, commanding officers must assume responsibility for retaliative measures when an unscrupulous enemy leaves no other recourse against the repetition of barbarous outrages."

¹⁰ According to a press release from the Department of State of Dec. 29, 1941, it was announced that there had been received through the Swiss Legation at Washington, a communication from the Japanese Government in which it protested the alleged killing of ten Japanese nationals at the time of the assault by the Japanese forces against the city of Davao on the Island of Mindanao. The Department made the following comment:

"This Government had not previously heard of the alleged incident and has no reports whatsoever which would substantiate in the slightest degree the incident complained of by the Japanese Government.

"For days previous to the delivery of this note, the Japanese not only had been continuing their unprovoked aggression against the Philippine Islands but they have also ruthlessly, wantonly and with a complete lack of humanity bombed the defenseless civilian population of a declared open city, have killed scores of civilians and have wounded hundreds more.

"While the United States would not condone the acts of any of its officials or of any persons under its authority which contravene accepted rules of international law, and will always investigate complaints and take such proper steps as may be warranted under the facts, the record established by Japan over a number of years and in her recent activities in the Philippines clearly shows a wholly wanton disregard by Japan of international law and of principles of humanity and even of the elemental rules of decency designed to avoid needless injury to defenseless civilian populations. The objective of the Japanese in making this protest is clear, that is, to attempt to divert attention from their iniquities by making accusations against others."

extraordinary and minister plenipotentiary, at least for a period of years. The suspension of use of ambassadors for thirty years after the resumption of peace might have a salutary effect.

At the moment the chief consideration is to give voice to a determination that shall be heard in Japan, that its contempt, as our enemy, of the laws of war will not be tolerated, and that it will not be forgiven until convincing evidence of national regret is forthcoming that manifests itself both in abstinence from lawless conduct and in the making of full amends for past misdeeds.

CHARLES CHENEY HYDE

JAPAN ATTACKS THE UNITED STATES

Japan began war against the United States by a treacherous attack upon Pearl Harbor before her emissaries had terminated the negotiations supposedly undertaken in an effort to discover some possible basis for a peaceful settlement of our differences. The actual attack took place one hour before the Japanese envoys had handed Secretary Hull the reply of Japan rejecting the terms of the American proposals for a settlement. Secretary Hull used very emphatic language to express to the Japanese diplomats his indignation at the manner in which Japan had increased its forces in southern Indo-China while the peace negotiations were in progress.

President Roosevelt in an effort to explore every possibility of avoiding war had sent a message directly to the Emperor in which he called attention to the traditional and almost century-old friendship between the two countries. He urged the Mikado to use his influence for peace. To President Roosevelt the Emperor sent no direct reply. Instead the Japanese Minister for Foreign Affairs several hours after the Pearl Harbor attack communicated to Ambassador Grew the reply which had already been delivered to Secretary Hull rejecting the American proposals. The Foreign Minister also stated that he had been in touch with the Emperor and the Emperor desired that the memorandum delivered to Secretary Hull be regarded as the Emperor's reply to President Roosevelt's message. The Foreign Minister made a further oral statement: "His Majesty has expressed his gratefulness and appreciation for the cordial message of the President." The oral message as transmitted by the Minister concluded: "Establishment of peace in the Pacific, and consequently of the world, has been the cherished desire of His Majesty for the realization of which he has hitherto made his government to continue its earnest endeavors. His Majesty trusts that the President is fully aware of this fact." Whether this message really emanated from the Mikado cannot be ascertained, but long before this oral reply was made Premier Tojo had despatched the warships and aircraft which were to make that never-to-be-forgotten treacherous attack.

✓ The Pearl Harbor attack has been compared with the surprise attack upon the Russian fleet in Chemulpo harbor on February 8, 1904, which began the Russo-Japanese War. But the situation was quite different. At that time

there was no generally recognized rule of international law which required a previous declaration before recourse to hostilities. Even then a treacherous or perfidious surprise attack in time of peace was well understood to be contrary to international law. There was, however, some question as to how clear Japan had made her intention to reserve her right to substitute hostilities in place of the diplomatic negotiations and relations which she had terminated.¹

Japan was then very sensitive in regard to her standing among the civilized nations and felt deeply the criticism to which she was subjected in some quarters because of the Chemulpo attack. She was consequently ready to consider at the Second Hague Peace Conference the adoption of a convention requiring a formal declaration of war before commencing hostilities. But she insisted that this regulation must be regarded as made for the future and not as a formulation or codification of existing international law. In due course Japan signed and ratified, as did Great Britain, The Netherlands, Siam and the United States, the Third Convention of the Second Hague Conference. Article I of this convention provides:

The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.

It is to be noted that a treaty made for wartime, and this convention belongs in that category, is placed under the sanction of the military honor of the signatories. To disregard it is a breach of military honor as well as of international law. Yet Japan did not hesitate to commit this heinous offense. In this most dishonorable manner she thrust war upon the United States before the termination of the peace negotiations which we were pursuing with the representatives of the Mikado.

It is perhaps to be regretted that the American declaration of war did not emphasize the perfidy of the Japanese attack and did not specifically refer to the violation of the Hague Convention Relative to the Opening of Hostilities. Prime Minister Churchill, reporting to Parliament that the Cabinet had declared war against Japan, called attention to the violation of Article I of the Hague Convention which, as he stated, had been signed and ratified by Great Britain and Japan. But President Roosevelt in his address to the nation following the declaration of war on Japan did pillory Japan for its "sudden criminal attacks." He declared that "no honest person, today or a thousand years hence, will be able to suppress a sense of indignation and horror at the treachery committed by the military dictators of Japan, under

¹ On Feb. 6 the Japanese Minister at St. Petersburg, acting under instructions, notified Count Lamsdorff of the severance of diplomatic relations and that same day the Russian Minister at Tokio was informed of the rupture. (Asakawa, *The Russo-Japanese Conflict*, Boston, 1904, pp. 344-345, 351.)

the very shadow of the flag of peace borne by their special envoys in our midst," and he enumerated the calendar of shame containing the series of attacks begun by Japan and Hitler "without warning"—an impressive list which no American will ever forget. In the words of President Roosevelt's message to Congress, the acts of Japan have left a record "for all history to read in amazement, in sorrow, in horror and in disgust!"

The Japanese dictators and military party in control of the nation, like the German Nazis, restrict their loyalty to what they believe will redound to the advantage of their own nation. They have no real conception of a Society of States based upon the obligation of international coöperation and mutual respect. The totalitarian concept of the Axis Powers and that other concept of a Society of States coöperating for their common interests under a supreme supra-national law cannot be reconciled. The Axis concept is a throwback to a past age that the democracies have left far behind. The armed might of those who support the totalitarian ideal must be eliminated in order that peace may reign on earth.

The laws of war of which this treacherous attack was a conspicuous violation have been evolved and have survived because they make for effective fighting. They are the rules of warfare followed by the nations that have survived, and it seems reasonable to believe that the observance of these rules was a determining factor in national survival. The fecial law of the Romans was a purely Roman system of law, yet it formulated rules of procedure in regard to the declaration of war and the obligation of due notice which correspond to the present rule observed by law-abiding members of international society. Even by now the Japanese and Hitler must have seen that American unity was achieved as a consequence of Japanese treachery. This unity of purpose has more than counterbalanced any advantage derived from Japan's violation. If they do not understand this now the lesson will be driven home to them on land and on sea.

The world cannot afford or endure the perpetuation of the era of totalitarian armament which will be necessary as long as there exists any state capable of planning such a treacherous attack as that launched on Pearl Harbor.

ELLERY C. STOWELL

THE ATTORNEY GENERAL INVOKES REBUS SIC STANTIBUS

On August 9, 1941, President Franklin D. Roosevelt proclaimed that the International Load Lines Convention of 1930 was no longer binding on the United States "for the duration of the present emergency." He based this unilateral suspension of the treaty on "changed conditions" which, he said, had conferred on the United States "an unquestioned right and privilege under approved principles of international law" to declare the treaty inoperative.¹ The President's proclamation was made on the advice of Acting Attorney General Francis Biddle who had informed the President

¹ Cf. Department of State Bulletin, Vol. V, No. 111 (Aug. 9, 1941), pp. 114-115.

that: "It is a well-established principle of international law, *rebus sic stantibus*, that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. Suspension of the convention in such circumstances is the unquestioned right of a state adversely affected by such essential change."²

This surprising, and, indeed, reckless and unnecessary, espousal by the United States of a much questioned doctrine by which Germany, Italy, Japan, and Soviet Russia might equally well justify the suspension, termination, or even violation, of inconvenient treaties renders desirable an examination of the conditions and legal principles set forth by the Attorney General in his opinion.

First, it should be stated that the existence of the doctrine as a rule of international law has scarcely been established. A recent student of the subject writes:

The doctrine of *rebus sic stantibus* has been defined by neither an international tribunal nor a treaty between states. The problem of defining the doctrine has been left in the hands of writers on international law. The definitions of the doctrine which are given by these writers vary from one another in such a fundamental way, despite superficial similarities, that one may safely say that there is no definition upon which a majority of writers agree.³

Older writers have been impressed by the "authority" of earlier writers. Others, less interested in existing law than in what law should be, have defined the doctrine so that it might fulfill the function considered desirable by the individual writer.⁴

If one turns from the opinions of writers to the practice of states, it is of record that the doctrine has never been invoked by a state without being challenged by other states. Nevertheless, the few states which have invoked it have been in agreement on one point: the doctrine has been "clearly based juridically upon the intention of the parties at the time of the conclusion of the treaty."⁵

To what extent was a unilateral right to terminate the International Load Lines Convention because of "changed conditions" envisaged by the parties to that treaty?

² Opinions of the Attorney General of the United States, Vol. 40, No. 24 (July 28, 1941): International Load Line Convention.

³ Chesney Hill, *The Doctrine of "Rebus Sic Stantibus" in International Law*. University of Missouri Studies, Vol. IX (1934), p. 7.

⁴ *Ibid.*, p. 75.

⁵ *Ibid.* Professor Hill adds: "A change of circumstances becomes relevant to the obligatory force of a treaty only in so far as it is related to the wills of the parties to the treaty at the time of the conclusion of the treaty. It is not an objective rule of international law which is imposed upon the parties, but is a rule for carrying the intention of the parties into effect." *Ibid.*, p. 77. This conception of the doctrine of *rebus sic stantibus*, he adds, was that adopted by Turkey in 1922, by Belgium in 1927, by France in 1928 and 1931, by Persia in 1929, by Swiss courts in 1882 and 1928, and by the U. S. Court of Claims in *Hooper, Admr., v. U. S.*, 22 Ct. Cl. 408 (1887).

In 1930 maritime experts representing thirty states drafted and signed at London the International Load Lines Convention in order, as the preamble states, "to promote safety of life and property at sea by establishing in common agreement uniform principles and rules with regard to the limits to which ships on international voyages may be loaded." The treaty came into force between fifteen of the signatories, including the United States,⁶ on January 1, 1933, and by September 1, 1935, had been ratified or acceded to by 36 "governments."⁷ The convention contains no provision permitting its suspension in time of war by either belligerents or neutrals, but Article 25 stipulates that the convention may be denounced at any time after it has been in force for five years, such denunciation not to take effect until twelve months after it has been received. Article 20 states, in part, that "modifications of this Convention which may be deemed useful or necessary improvements may at any time be proposed by any Contracting Government . . . and if any such modifications are accepted by all⁸ the Contracting Governments . . . this Convention shall be modified accordingly." It is clear that no provision of the treaty authorizes the action taken by the United States Government, which was neither a denunciation subject to one year's notice, nor a proposed modification in the line of an improvement, subject to unanimous acceptance, but was a unilateral declaration that the treaty was immediately "suspended and inoperative" in so far as the United States is concerned.

The immediate occasion for this action by the United States Government is interesting. In the spring of 1941 the United States supplied "a large number" of American oil tankers to the British Government.⁹ Mr. Harold L. Ickes, American Petroleum Coördinator for National Defense, commenced issuing periodic threats that because of the transfer of tankers, a serious shortage in gasoline and oil would result in the northeastern portions of the United States. In June he urged Congress to pass legislation relaxing load line restrictions on coastwise and intercoastal shipping in order to increase the carrying capacity of tankers. Since coastwise and intercoastal shipping did not come within the scope of the International Load Lines Convention, Congress relaxed our safety regulations for the domestic trade.¹⁰

⁶ U. S. Treaty Series, No. 858, p. 153; 47 Stat. L. 2228.

⁷ 40 Op. Atty. Gen., No. 24, p. 2.

⁸ The statement of the Department of State (Bulletin, *loc. cit.*, p. 114) that it "has conferred with the American republics that are parties to the convention, namely, Argentina, Brazil, Chile, Cuba, Mexico, Panama, Peru, and Uruguay, all of which have agreed to the suspension" is not evidence that suspension of the convention by the United States was in accordance with Article 20. Neither the Attorney General in his opinion nor the President in his proclamation makes any such assertion.

⁹ Sir Arthur Salter to Mr. Ickes, in Release from Petroleum Coördinator Ickes. Congressional Record, Vol. 87, p. 8412 (daily edition, Oct. 23, 1941).

¹⁰ Cf. N. Y. Times, June 12, 1941, 26:4, and passage of H. R. 4988 to amend Sec. 2 of the Act of Aug. 27, 1935, as amended. Cong. Rec., Vol. 87, pp. 5329 (June 16, 1941) and 5844 (June 30, 1941).

While Mr. Ickes and his critics continued to bombard the American public with heated predictions and denials of an Eastern gas shortage, Mr. Ickes informed the President on July 17 that he was faced with a serious shortage of oil tankers and asked whether, in view of the war-time dislocation of sea-borne commerce and "the pressing need for tanker tonnage," the International Load Lines Convention must still be considered binding on the United States. He indicated further that this particular international obligation had become inconvenient because, if larger loads could be carried in foreign trade, fewer tankers would have to be diverted from the domestic trade.¹¹

Mr. Ickes' inquiry whether, because of war conditions and the "pressing need" for tankers, the International Load Lines Convention must still be considered binding on the United States, was referred by the President to the Attorney General. It was impossible for Mr. Biddle to prove either that the treaty authorized the contemplated suspension or that a situation had arisen for the United States in which the existence of war permits the suspension of certain treaties as between enemy states. He therefore made the assumption that "it is clear" from its general nature and detailed provisions that the convention was "a peacetime agreement." The same assumption might properly be made of an overwhelmingly large proportion of treaties made since the beginning of time without justifying the conclusion drawn therefrom by the Attorney General. Mr. Biddle furnishes no evidence that any other party to the treaty was violating it, but states that "*conditions* essential to the operation of the convention, and assumed as a basis for it, are in almost complete abeyance." He adds that ten "of the 36 governments which acceded to or ratified" the treaty are at war and sixteen are under "military" occupation.¹² He proceeds, with complete

¹¹ 40 Op. Atty. Gen., No. 24, p. 1. Whether the alleged desirability of suspending the International Load Lines Convention was due to the domestic situation or due to our aid-to-Britain policy is far from clear. In announcing in October that the British were returning forty oil tankers to "the normal American service," the office of the Petroleum Coördinator stated, in part: "The diversion of American-flag tankers to the shuttle service, as part of the aid-to-Britain program, began last spring. Later, still more ships were transferred to the shuttle movement, but the exact number was never officially announced. . . . (The shuttle service involves the hauling of oil from Caribbean and Gulf coast ports to points north of Cape Hatteras by American-flag tankers. From these points it is reshipped to England and the British Empire in British or foreign-flag vessels.)" Cf. Statement by Petroleum Coördinator Harold L. Ickes on Return of American Tankers. Cong. Rec., Vol. 87, p. 8412 (Oct. 23, 1941). If the American tankers diverted to the British were engaged in the coastwise trade, they were not engaged in "international voyages" within the scope of the International Load Lines Convention. That convention applies only to "ships engaged in international voyages" (Art. 2); and an international voyage is defined as "a voyage from a country to which this Convention applies to a port outside such country, or conversely" (Art. 3). Moreover, load line regulations in regard to coastwise shipping had been relaxed prior to Mr. Ickes' request of July 17.

¹² It is difficult to discover what sixteen maritime states the Attorney General had in mind; but he does not say they were under "enemy" occupation, and possibly he refers to states

irrelevance, to tell us that Eire, Portugal, and Sweden, parties to the convention, are "striving with varying success to preserve a precarious neutrality"; that Germany has invaded and conquered many states that are parties to the convention; that Germany carries on her own "international" shipping primarily in waters under her control; that "international shipping is not being carried on under normal conditions" but, on the contrary, shipping is being subjected to "actual destruction," however loaded. In such a case, he concludes, the treaty obligations with respect to load lines "are of small moment indeed."

The circumstances set forth, and the serious shortage in shipping of signatories to the convention, "including those whose defense the Congress has declared essential to the defense of the United States," lead the Attorney General to conclude that "the implicit assumption of normal peace-time international trade, which is at the foundation of the Load Lines Convention, no longer exists"; that the convention "*has ceased*" to be binding (on the United States); that the United States therefore has an "unquestioned right" under the "well-established principle of international law, *rebus sic stantibus*" to suspend¹³ the treaty.

The necessity for suspending a convention which has assertedly already ceased to be binding through the operation of an alleged principle of international law is not clear to the writer. Nor is it clear why circumstances of admittedly general application should lead to the suspension of the treaty only by the United States. Moreover, the evidence presented by the Attorney General fails to establish that the parties to the convention—the purpose of which was to establish minimum safety regulations—intended that the occurrence of war should release the parties from the obligations assumed. The fact that safety of life and property at sea is noticeably less evident in time of war than in time of peace proves neither the desirability of relaxing those safety regulations which continue to be possible nor that the parties to the convention in question so intended.

The Attorney General supports his contention that the doctrine of *rebus sic stantibus* is a "well-established principle of international law" by carefully culling from pages 1098 and 1099 of the Harvard Research Draft on the Law of Treaties,¹⁴ certain opinions favorable to his thesis. It is unfor-

like Iceland, Latvia, or Egypt, or to colonies, which, however, under Article 21 of the convention, do not accede or ratify in their own names.

¹³ Cf. Hill, *op. cit.*, p. 14: "The doctrine of *rebus sic stantibus*, whatever its definition, is usually regarded as a rule for the *termination* of the obligations of a treaty, and not as a rule for the *suspension* or the revision of the obligations of a treaty." Italics supplied.

¹⁴ This JOURNAL, Supp., Vol. 29 (1935), pp. 1096-1126. The Attorney General quotes Klüber, Phillimore, Westlake, and a passage from Sir John Fischer Williams which omits Williams' conclusion that the doctrine of *rebus sic stantibus* "is not a doctrine that one State may by unilateral declaration rescind or modify its obligations. If it is to be put into force, the proposition that the essential conditions have changed needs either the assent of all parties interested in the obligation or the decision of a tribunal." Cf. this JOURNAL,

tunate (as Professor Borchard has written of another Attorney General) that the Attorney General's researches were so easily diverted from the whole truth, if rules of law constituted the object of investigation. For example, the same source to which the Attorney General referred states on p. 1102 that "the preponderance of opinion among them [i.e., writers on the subject of *rebus sic stantibus*] is that one party to a treaty may not, under the rule of *rebus sic stantibus*, unilaterally declare its obligations thereunder to have ceased to be binding, whether or not a request has previously been made." Similarly, on page 1124, Professor Garner concludes his survey of the practice of states with the statement that:

The principle is well established that one party to a treaty does not have the right to terminate its treaty obligations unilaterally merely upon the ground that it believes that the doctrine of *rebus sic stantibus* is applicable to the treaty.

Indeed, Mr. Biddle, if interested in one of the most able and comprehensive analyses of state practice on the subject, might well have consulted Professor Chesney Hill's *The Doctrine of "Rebus Sic Stantibus" in International Law*, which states:¹⁵

Despite any theoretical objections to the contrary, it remains true that customary international law lays down the rule that a party who seeks release from a treaty on the ground of a change of circumstances has no right to terminate the treaty unilaterally, and that recognition that the doctrine is applicable must be obtained either from the parties to the treaty or from some competent international authority.

These conclusions, based on the practice of states, throw light on the Attorney General's "unquestioned rights" and "well-established" principles.

The Attorney General concedes that "ordinarily" a state which relies on the principle of *rebus sic stantibus* should "request agreement" of the other parties for termination or suspension of a treaty, but believes this a mere matter of procedure which does not affect the right of termination. This arbitrary rejection of one of the essential elements of the concept of *rebus sic stantibus* suggests that the suspension of the International Load Lines Convention is not so much based on the principle of *rebus sic stantibus* as upon some vague and slippery doctrine of state necessity. One is reminded of Secretary of State Cordell Hull's assertion that certain rules of Hague Convention XIII, which he admitted are declaratory of international law in

Vol. 22 (1928), p. 103. Similarly, the Attorney General cites Lauterpacht's 6th edition of Vol. I of *Oppenheim's International Law*, Sec. 539, and McNair, *Law of Treaties* (1938) 376, 378. These citations will trap only those who fail to check them. The 6th edition of Vol. I of Oppenheim is not yet available to the writer because it has not been published, but Sec. 539 of the 5th edition of Oppenheim, and McNair, 376 ff., fail to support the burden imposed on them by the Attorney General.

¹⁵ *Loc. cit.*, p. 78.

"ordinary" circumstances, cease to be binding in situations "extraordinary in character."¹⁶ One recalls also the statement of Professor Josef L. Kunz that there are "the politicians—often, consciously or unconsciously, also among men who want to be considered as scholars—who have always so conveniently two international laws . . . one for one's own nation and those we like, the other against the nations we do not like."¹⁷

Quite aside from questions as to the nature and validity in international law of the doctrine of *rebus sic stantibus*, was the alleged necessity for suspending the International Load Lines Convention real or was it the product of hysteria? If the reason for suspending the treaty was the domestic situation, we have the statement of the United States Senate Special Committee to Investigate the Shortage of Gasoline, Fuel Oil, etc., that "unnecessary alarm" and "hysteria" were created by the Oil Coördinator's office and that "the whole frightening picture, from the standpoint of the Coördinator's Office, seems to lie in the fact that the shortage, which has excited the activity of the Coördinator, is really a 'shortage' in a large surplus which is desired . . . and not a shortage of products or lack of facilities to transport them."¹⁸ It will be recalled that the initiative for relaxing load line restrictions both in domestic and foreign trade came from Mr. Ickes.

If, however, it was the aid-to-Britain policy which led to the suspension of the treaty, it should be noted, first, that United States tankers, however loaded, were prohibited by the Neutrality Act from entering the war zones; second, that the tankers in the coastwise service were not engaged in voyages regulated by the International Load Lines Convention; and, third, that if American tankers were actually transferred to British registry, the obligations of the treaty as to these tankers would be restrictions on British, not American, action. In no one of these cases would it seem necessary to suspend the treaty. That leaves the possibility that it was deemed essential for tankers to carry larger loads to (or from) Near Eastern, Far Eastern, or Latin American ports. It is to be noted, however, that the American tankers which the British discovered they did not need were placed in the American east coast service.¹⁹

Assuming, *arguendo*, that an immediate necessity did exist for suspending the operation of this treaty—a necessity which would not brook the twelve months delay stipulated by Article 25 of the convention—was the method

¹⁶ Cf. Lend-Lease Bill, Hearings before the Committee on Foreign Affairs, House of Representatives, 77th Cong., 1st Sess., on H. R. 1776. Testimony of Secretary Hull, pp. 9, 23, 47 (Jan. 15, 1941).

¹⁷ Josef L. Kunz, "Neutrality and the European War, 1939-1940," 39 *Michigan Law Review* (1941) 719.

¹⁸ Cf. remarks of Senator Francis Maloney in presenting the Preliminary Report of the Committee. Cong. Rec., Vol. 87, p. 7579 (Sept. 11, 1941). It should be added that the transportation facilities here referred to are tank-cars.

¹⁹ Release from Office of Petroleum Coördinator. Cong. Rec., Vol. 87, p. 8412 (Oct. 23, 1941).

chosen the only way to obtain release from the treaty? Mr. Biddle presents no evidence that any party to the convention had violated it, but in his closing paragraph he indicates that because the doctrine of *rebus sic stantibus* was so convenient, he has found it unnecessary to discuss "the well established international practice that a violation of a treaty by one contracting party renders the treaty voidable at the option of another contracting party injured by the violation." Injury might be difficult to prove because of the nature of the obligations in the International Load Lines Convention, but, assuming that the violations existed,²⁰ the principle seems well-enough established to permit suspension on that ground. This would be infinitely preferable to the method chosen. The dangers inherent in a general resort by states to the doctrine of *rebus sic stantibus* for release from inconvenient treaty obligations could be no better illustrated than in the reasoning and methods employed by the Attorney General in this case.

HERBERT W. BRIGGS

CAPTURE OF THE GERMAN STEAMSHIP "ODENWALD"

On November 6, 1941, the American cruiser *Omaha* in Atlantic equatorial waters cited a merchant ship flying United States colors and with the United States flag displayed on either side of her hull and on her deck, and bearing the name *Willmoto*—the name of a United States merchant ship. Philadelphia was shown as her home port. Since her appearance was suspicious, the cruiser signalled by searchlight to heave-to, approached close enough to talk by megaphone to the bridge, and gathered the information that she was bound from Capetown to New Orleans. The questions were answered in poor English and no answer was given to the question "Why don't you answer signal?" At the same time, numerous packages were being thrown over the side. In order to identify the ship, a boarding party was ordered to investigate. The *Willmoto* then hoisted the signal, "I am sinking. Please send boats," and at the same time the crew commenced leaving the ship in lifeboats. As the boarding party reached the ship there were two explosions aft. The investigation disclosed the ship to be the *Odenwald*, which had left Yokohama two months previously, made its way around Cape Horn and was believed to be destined for Bordeaux; that she was owned by subjects of Germany, that she was sailing under false colors and that she was severely damaged by her German crew in an attempt to scuttle her. The cruiser put a salvage party aboard and, after some hours' work, succeeded in minimizing the damage caused by the explosions, and getting the engines running. The cargo consisted of over three tons of baled raw rubber and many United States-made automobile tires with inner tubes, together with some peanuts and rice. She carried no armament and is

²⁰ The President refers in his proclamation of Aug. 9, 1941, to "the partial and imperfect enforcement of the Convention." Bulletin, *loc. cit.*, p. 114.

listed as a Hamburg-American ship. The American cruiser took her into San Juan, Puerto Rico, on November 17, 1941.¹

The *Odenwald* was libeled in the Federal Court of San Juan by the United States District Attorney on behalf of the *U. S. S. Omaha* and her crew, for salvage. The libel asserted that the German motor ship was found flying the Stars and Stripes and masquerading as the *Willmote* of Philadelphia, that she was abandoned by her master and crew, who signalled, "I am sinking. Please send boats," and that she was brought in by a salvage crew of the *Omaha* at great risk. The *Odenwald's* crew has been turned over to the United States Army and will presumably be handed over to the immigration authorities for detention in the same manner as other German seamen.²

This incident raises several interesting questions. The misuse of the flag of the United States led to the capture of the *Odenwald*. The German accent of the officer answering the hail gave away the ruse. The use of false flags and markings as a *ruse de guerre* has long been a practice in time of war by maritime nations. It is probably clear in international law that a false flag may be used by a belligerent warship to screen its operations and to decoy the enemy. But before opening hostilities the warship must hoist her proper flag.

As to belligerent merchant ships, the use of a neutral flag has been asserted by some writers and by various countries, particularly England, as a well-known and long-established practice, in order to escape capture. In the last war Great Britain asserted the right to use neutral flags and markings on her merchant vessels. The United States, Holland and the Scandinavian countries protested against this general use. Early in 1915, the United States tried in vain to get Britain to agree that her merchant vessels would not use neutral flags as a *ruse de guerre*. Dissatisfaction with the practice has been growing and the better view seems to be that it should be discontinued. In the Neutrality Act of 1939, the United States forbids foreign vessels to use the United States flag or any signs or markings indicative of an American vessel on the pain of exclusion from United States ports for three months.

Whether a flag is false or not depends upon the right of the vessel to fly it. Each country may determine the conditions of the use of its flag. Generally speaking, ownership seems to be the essence of the right to fly a national flag. This appears to be true in practically all countries with perhaps two or three exceptions. A vessel is no different from any other piece of property and can have no nationality apart from ownership. American ownership gives the right to fly the United States flag. Consequently, the flag is only presumptive of the right to fly it and is not conclusive as to the nationality of the vessel. Article 57 of the Declaration of London of 1909, which some of the belligerents enforced for a short time at the beginning of the last war, does not

¹ Navy Department Press Releases, Nov. 16 and 17, 1941.

² Associated Press, Nov. 19, 1941.

require ownership, and even enemy-owned vessels were released pursuant to its provisions. But subsequently the general practice was to look back of the flag and even of the register and other papers on board, and ascertain the real ownership. England went beyond nominal ownership and made the effective control the test of enemy character in several cases.

How is a disguise to be determined? Only belligerent warships have the right to visit and search on the high seas, that is, to stop merchantmen of any nationality to determine their ownership and their employment in legitimate wartime traffic.³ The United States, however, on November 6, 1941, when the *Odenwald* was seized, was not a declared or recognized belligerent and did not have the belligerent right as such to stop and investigate foreign merchant vessels at sea. However, the *Odenwald* pretended to be an American vessel and was displaying the American flag and other insignia. In such a case, an American warship, as a matter of municipal law and regulation, has a right to stop any American vessel or any vessel masquerading as such in order to investigate its nationality and its right to fly the American flag. No exception, therefore, can be taken to such action of the American cruiser in this case.

What is the basis of the seizure of the *Odenwald*, after she was determined to be a German vessel sailing under false colors? She could not be seized as a prize of war, because at the time the United States was not, as stated above, a recognized belligerent, and therefore could not exercise the belligerent right of capture at sea. There is no penalty against a foreign merchant vessel using a false flag in international law, or of a foreign vessel using an American flag under American law, save exclusion for a time from American ports.⁴ The American cruiser, therefore, was well advised in bringing in the vessel not as a captor, but as a salvor.

The *Odenwald* was brought into San Juan under a salvage crew of the *Omaha* and a libel was filed by the United States District Attorney against the vessel for full salvage. The libel asserts, according to the press statement, that she was flying the Stars and Stripes, although she was a German motor ship, and that she was abandoned by her master and crew as in a sinking condition. Whether these are sufficient grounds to support the claim for salvage will be determined by the court. This is purely a municipal proceeding under the laws of the United States.⁵ It is understood that the case has not yet been decided by the Federal Court.

Bringing in the vessel and libeling her for salvage has had the effect of preventing the vessel herself as well as her valuable cargo of rubber from reaching Germany, and has had the further result of retaining her in custody until war has been declared between Germany and the United States. Un-

³ There is a limited right of visitation, now seldom exercised, on sound suspicion of piracy or slave trade. Patrolling to prevent breaches of revenue, navigation and other municipal laws is a different matter.

⁴ Joint Resolution, Nov. 4, 1939.

⁵ See Federal Code, Sec. 750, p. 1528.

der the salvage proceeding she and her cargo would probably be sold, perhaps to the United States, and the salvage money distributed according to law. Should this proceeding fail, and as war has broken out, she presumably might be seized in the harbor as prize of war by the United States, and if condemned by a prize court, would pass directly into the ownership of the United States.⁶

L. H. WOOLSEY

COURTESY TO OUR NEIGHBORS:

President Roosevelt in his press conference of November 25, 1941, expressed his deep sorrow at the death of Dr. Pedro Aguirre Corda, who had retired three weeks before from the presidency of Chile because of ill health. The President took this occasion to denounce as a "disgusting lie" an article which had appeared in *Time* magazine of November 17. The article described Dr. Aguirre as spending "more and more time with the red wine he cultivates." President Roosevelt took the unusual step of permitting direct quotation of his remarks, which, as he himself told reporters, were stronger than any he had been forced to direct at any American publication during his eight years in the White House. To this charge Henry R. Luce, Editor of *Time* magazine replied:

Time's sympathetic article on the political difficulties and ill health of the late President of Chile was based on a number of reports received from *Time's* correspondents.

Time realizes that the pressure of international politics may explain President Roosevelt's denunciation but believes that the President's words are unwarranted by the facts and unwise as an attack on a free and honest press.

Time has already received protests from Chilean officials, but no one had said anything in *Time's* report was untrue until the President called it a "disgusting lie."

In view of President Roosevelt's extraordinary outburst, *Time* will later make a complete report on this episode.²

The White House report of the President's statement was as follows:

The first thing I am going to speak about is the one I feel most deeply about.

I am very sorry to get word from the State Department that the President of Chile has died. That brings up a disagreeable fact—that the Government of the United States has been forced to apologize to

⁶ Since writing the above, it appears from the press dispatches that the owners of the ship defaulted in answering the libel for salvage and that the ship has been requisitioned by the United States Maritime Commission with the approval of the United States Court in San Juan. It is said the cargo will go to the Defense Supply Commission. Associated Press, Dec. 28, 1941; New York Times, Dec. 22, 1941.

¹ The international law obligation relative to the respect due foreign sovereigns, statesmen, and neutral flags was discussed in this JOURNAL, Vol. 25 (1931), p. 321; Vol. 29 (1935), p. 663; Vol. 31 (1937), p. 301.

² Associated Press dispatch, New York, Nov. 25, in Washington Post, Nov. 26, 1941.

the Government of Chile for an article written in *Time* magazine—a disgusting lie which appeared in that magazine.

It was, of course, immediately cabled to Chile. It arrived at the time that the President had left office in a very ill condition, and we are informed by our Ambassador that this article was a notable contribution to Nazi propaganda against the United States.

It is being widely used by the Nazi, Fascist and Falangist press. The United States Ambassador to Chile shares wholeheartedly in the general indignation and disgust. He reports to the Secretary of State that this is another illustration of how some American papers and writers by such methods are stocking the arsenals of propaganda of the Nazis to be used against us.

The President of Chile is now dead. I am deeply sorry.

The episode of the article will not be easily forgotten in Chile.

I wish to take this opportunity, as President of the United States, to express the deep regret of the Administration and the American people to the people of Chile; especially to the family of the late President.³

The apology had been previously reported in the press:

United States Ambassador Claude G. Bowers said today that he had called his government's attention to an "outrageous" dispatch referring to President Pedro Aguirre Corda in the November 17 Latin-American issue of *Time* magazine.

Bowers said he was summoned this noon by Minister of the Interior Dr. Leonard Guzman, who showed him an article "at the bottom of page 16 of the November 17 edition referring to President Aguirre's illness."

"I immediately repudiated the statements made therein in the name of the American people. I think that it is an outrage that such ill-founded attacks be made on a sick man."

The November 17 United States issue of *Time* magazine carried a dispatch on page 28 on President Aguirre, who temporarily relinquished his office November 10 because of ill health. It said in part:

"While the Popular Front swayed, bushy-mustached President Aguirre felt more and more like a man who does not govern but merely presides. He spent more and more time with the red wine he cultivates. Fortnight ago he was reported ill.

"This week his journalistic enemy, *El Imparcial*, called for a medical bulletin to allay 'public anxiety.' Don Tinto issued a political bulletin. He announced his temporary retirement on account of bronchitis and gripe, by law turned over his powers to Minister of the Interior Mendez."

Commenting on the dispatch, Bowers said that "this is one of a series of similar misstatements in sundry United States journals of late, which are considerably harming friendly relations between the American nations."⁴

No doubt the very delicate international situation made it especially important not to offend neighboring governments. And posthumously the

³ Washington Post, Nov. 26, 1941.

⁴ United Press despatch from Santiago, Nov. 20, 1941, in Washington Post, Nov. 21, 1941.

incident took on a still graver aspect. An editorial in the *Washington Post*⁵ considered that President Roosevelt was inconsistent with the past practice of this Government in assuming "a sort of responsibility for the comment" and observed that the "comment itself was couched in ambiguous language." The Presidential action was criticized as tending to restrict the freedom of the press.

It is to be noted that Editor Luce controverts the aspersions on the veracity of the *Time* statement, but that does not affect the impropriety of making it; for, like the ancient law of libel, the greater the truth the greater the offense. The prime purpose of international law is to keep the peace, and an insulting statement which is true is likely to disturb relations more than one which can be ignored or refuted as lacking foundation.

It is a generally recognized principle of international law that the flag and sovereign of a foreign state should not be insulted or treated with disrespect. In place of sovereign, we may read head of state. Now it is true that when the head of a state is actually responsible for its foreign policy a certain latitude of criticism abroad must be tolerated, but this should not involve the person of the head of the state or the use of opprobrious language.

The importance of the observance of this rule received an amusing illustration some time ago in France, to quote the press report:⁶ "The *Revue de Paris* in an economic survey of Iran, declared the Shah of Iran was once a Cossack officer. Iran declared that this was untrue, protested and the magazine printed a correction. Thus that incident was smoothed over until *L'Europe Nouvelle* mentioning it, headed its article '*Il n'y avait pas de quoi fouetter un shah.*' That was too close to an old French saying which means 'It's a mere trifle' to suit the Iranian administration. The only difference was that 'shah' appeared instead of the word 'chat' which sounds alike in French." Hardly had the harassed French Foreign Office succeeded in again smoothing down the ruffled Iranian sovereign when he considered himself still further insulted because of certain headlines which appeared in French publications relative to the annual Paris Cat Show. One of these read "*Quand Monsieur le Chat Reçoit Dans Son Salon*" [When Mr. Cat Receives in His Drawing Room] and another, "*La Nuit Tous les Chat Sont Gris*"⁷ [At Night All Cats Are Gray], a French proverb, but since *gris* in French slang means intoxicated it would be especially resented by a follower of Mohamet. But the Shah seemed to have been still more offended by photographs of the Cat Show with references to "His Majesty the Cat."⁸ Notwithstanding the efforts of the French Minister at Teheran, the Shah recalled his mission from Paris.⁹

This was a break of no slight importance to the French Government because it was intimated and feared that Iran might recall several hundred

⁵ Nov. 27, 1941.

⁶ A. P. despatch printed in New York Times, Jan. 20, 1937.

⁷ N. Y. Times, Dec. 31, 1938.

⁸ A. P. despatch, N. Y. Times, Feb. 22, 1939.

⁹ A. P. despatch, N. Y. Times, Jan. 10, 1939.

Iranian students in French schools and dismiss the French instructors running Teheran University and the French Military Mission training Iran's army. The break it feared might also affect many French commercial organizations seeking orders and a contract to construct the railway connecting the Caspian Sea with the Gulf of Persia.¹⁰ All of this to the benefit of the rival Italian and German interests. By following their proclivity for a pun and play upon words and disregarding the obligation to avoid hurting the feelings of the sovereign of a friendly state, the French press did their country a serious injury.

We had a somewhat similar experience when *Vanity Fair*, August, 1935, published a cartoon of the Mikado.¹¹ The Japanese Foreign Office made a statement in regard to the attitude of its Government:

The cartoon is regarded as insulting to the Japanese Emperor and if it were circulated in Japan it would have been likely to disturb public peace.

We have a particular sentiment of special devotion to our imperial house. If such a caricature were circulated among the Japanese people we are afraid it might have aroused ill feeling not only against the artist and publisher, but against the American people generally. Therefore we prohibited its circulation.¹²

So seriously did the Japanese Government regard the matter that instructions were issued to Japanese diplomatic representatives abroad "directing them to redouble efforts to prevent the publication in foreign countries of matter considered by them violative of Japanese ideas of the divinity of their Sovereign."¹³ The Japanese Ambassador called upon Secretary Hull to protest at the publication of the cartoon of the Mikado in *Vanity Fair*, and, at the subsequent press conference in reply to questions from correspondents regarding the call of the Japanese Ambassador that day, the following was given to the press:¹⁴

The Secretary of State in replying to the representations of the Ambassador of Japan relative to material which appeared in the current issue of an American periodical referred to the reported statement of the publisher denying any purpose to give offense.

The Secretary then said that he is always sorry when incidents occur or situations arise which are taken amiss and occasion misunderstandings between this and any other country.

This mild statement was perhaps as far as Secretary Hull could go in view of the nature of the incident.¹⁵ In the case of a country like the United

¹⁰ A. P. despatch, N. Y. Times, Jan. 20, 1937.

¹¹ N. Y. Times, Aug. 5, 1935.

¹² N. Y. Times, Aug. 5, 1935.

¹³ N. Y. Times, Aug. 5, 1935.

¹⁴ Given to the press under date of Aug. 5, 1935.

¹⁵ The Japanese found a new ground of complaint when their prince was pictured with the Dionne quintette (Washington Star, Aug. 6, 1935); and again when the Mikado was burlesqued in Seattle as pulling Haile Selassie in a jinrikisha, and the Japanese envoy protested this second insult. The Mayor of Seattle expressed regrets and stated that it was not in-

States where the President himself is often made the object of abusive caricature in the press, other states may be expected to take into account the jealousy of the public at any interference with what is considered to be the freedom of the press. Each state must evince a spirit of tolerance towards the institutions of its neighbors when there is no intention of giving offense.

If the Administration were given authority to exclude from the mails matter offensive to a neighbor, the exercise of such authority or the failure to do so would certainly prove embarrassing. Any state may exclude such matter as it considers objectionable from entry or circulation, as was done by Japan.¹⁶ The importance of doing nothing at this time to offend our sister republics of this hemisphere must serve as the sole justification of the extremely severe Presidential reprimand. The incident more truly relates to high policy than it does to action appropriate for the enforcing of the respect due to the head of a foreign state. American publications are nevertheless under a moral and a patriotic obligation not to lay themselves open in the future to censure in a similar manner.

ELLERY C. STOWELL

PERMISSIVE SANCTIONS AGAINST AGGRESSION

In his address of March 27, 1941,¹ Attorney General, now Justice Robert H. Jackson endorsed the widely accepted proposition that it is the privilege, but not the duty, of parties to the Pact of Paris to engage in sanctions against violators of that Pact. This proposition is similar to, but more precise than, the general doctrine of permissive sanctions endorsed by W. E. Hall and other international lawyers: "The existence of a right to oppose acts contrary to law and to use force for that purpose when infractions are sufficiently serious is a necessary condition of the existence of an efficient international law."²

The proposition is of considerable importance because it has been accepted by both the Congress and the Administration as the legal justification for their departures from the traditional requirements of neutrality,³ yet it seems to be imperfectly understood.

It has been suggested that the Attorney General sought "to prove" on the basis of the Pact of Paris and other treaties that "as a matter of law, the United States was now obliged to render to England (and presumably others) all aid 'short of war.'"⁴ It has also been suggested that the present writer

tended to ridicule the Emperor (Washington Star, Aug. 9, 1935; N. Y. Times, Aug. 10, Aug. 11, Aug. 13, Aug. 14, Aug. 15, 1935; N. Y. Herald Tribune, Aug. 10, 1935).

¹⁶ Turkey likewise banned the Vanity Fair cartoon (Washington Star, Aug. 16, 1935).

¹ This JOURNAL, Vol. 35 (1941), p. 348 ff.

² W. E. Hall, *International Law*, 8th ed., Oxford, 1934, p. 342.

³ Q. Wright, "The Lend Lease Bill and International Law," this JOURNAL, Vol. 35 (1941), p. 308 ff.; "The Repeal of the Neutrality Act," this JOURNAL, *supra*, p. 8.

⁴ E. M. Borchard, "War, Neutrality and Non-belligerency," this JOURNAL, Vol. 35 (1941), p. 618.

"seeks to demonstrate under the same inspiration and in the light of committee reports, that in becoming the 'arsenal of democracy' the United States is performing a legal obligation or exercising a legal privilege under international law."⁵

The Attorney General said that the Pact of Paris "destroyed the historical and juridical foundations of the doctrine of neutrality, conceived as an attitude of absolute impartiality in relation to aggressive wars. It did not impose upon the signatories the duty of discriminating against an aggressor, but it conferred upon them the right to act in that manner."⁶

The present writer wrote in April, 1941, "The Pact of Paris, ratified in 1929, was widely received as a general acceptance of the nonbelligerent's freedom, though not his duty, to refuse to a violator of the Pact the privilege of impartial treatment."⁷

The Attorney General has also been criticized for not mentioning the report of the Senate Foreign Relations Committee recommending ratification of the Pact of Paris, "which distinctly maintained that no obligations of any kind to enforce the Pact were contracted by or incumbent on the United States."⁸ Inasmuch as neither the Attorney General nor any other commentator on the Pact, so far as the present writer is aware, ever asserted that the United States acquired any *obligations* to enforce it, reference to this report was hardly relevant. Furthermore the Senate Foreign Relations Committee's report on the Lend-Lease Act explicitly endorsed the Attorney General's interpretation of the Pact.⁹

The Attorney General stated that "The very basis of these treaties was the assumption that, in this age of interdependence, its signatories had a direct interest in the maintenance of peace and that war has ceased to be a matter of exclusive interest for the belligerents directly affected." Recognition of the general interest in war, wherever it occurs, accorded in Article 11 of the League of Nations Covenant as well as in the Pact of Paris, provides the juridical basis for permissive sanctions. Such recognition does not, however, imply that participation in sanctions is obligatory.¹⁰

The statement that "not a scintilla" of the evidence as to the meaning of the Pact of Paris marshalled by the Attorney General "has any claim to

⁵ E. M. Borchard, "War, Neutrality and Non-belligerency," this JOURNAL, Vol. 35 (1941), p. 618. If the term "legal privilege" had been used alone, no fault could have been found with this statement.

⁶ Jackson, *op. cit.*, p. 354.

⁷ "The Lease-Lend Bill," this JOURNAL, Vol. 35 (1941), p. 311. The distinction between permissive and obligatory sanctions is also emphasized in quotations printed by E. M. Borchard and W. P. Lage, *Neutrality for the United States*, New Haven, 1937, pp. 259-260.

⁸ 77th Cong., 1st Sess., Sen. Rep. No. 45, p. 4.

⁹ This JOURNAL, Vol. 35 (1941), p. 623.

¹⁰ *Ibid.*, p. 624. An *interest* is not an *obligation*. The general interest of states in resorts to war was recognized in I Hague Convention, 1899, Arts. 1-3. See Harvard Research in International Law, Draft Convention on Aggression, this JOURNAL, Supp., Vol. 33 (1939), p. 844 ff.

being international law,"¹¹ raises a problem of the sources of international law. The Attorney General referred to general principles of law concerning the obligations of nonparticipants in war recognized by the classical writers such as Grotius, Vattel, Bynkershoek, Wheaton and Kent; to the recommendations of the Harvard Research in International Law concerning the rights and duties of states in case of aggression; to instances of partiality by Great Britain, Portugal, and several Latin American countries while nonbelligerent in the nineteenth and twentieth centuries; to the texts of the Pact of Paris and the Argentine Anti-War Treaty; to the practice of the parties, particularly the United States, in applying them in the Chino-Japanese, Finnish-Soviet and general European hostilities; and to the opinion of jurists, evidenced in the Budapest Articles of Interpretation, as to their meaning.

These sources are all among the types referred to in Article 38 of the Statute of the Permanent Court of International Justice and in the usual textbooks of international law. They are the kind of material which must be weighed to determine what the law is. It has been asserted, however, that "The Kellogg Pact has no legal force whatever," that the Argentine Anti-War Treaty "maintains the traditional obligations of neutrality," and that "the legal obligation to commit warlike acts against an alleged 'violator' of the Kellogg Pact, the 'aggressor', is derived from what is called the Budapest Articles of Interpretation," which "so far as known, not a single nation has ever adopted."¹²

The Budapest Articles of Interpretation certainly contain no statement that parties to the Pact of Paris are under "a *legal obligation* to commit warlike acts" against the aggressor, nor were they ever submitted or intended to be submitted to any government for formal adoption. The *freedom* to discriminate against the aggressor, which the Budapest Articles deduced from the Pact, has, however, been explicitly approved by high officials of the government of at least two states of some importance—those of Great Britain and the United States.¹³

Lord Howard of Penrith who, while British Ambassador to the United States, participated in the negotiation of the Pact, said in a notable House

¹¹ This JOURNAL, Vol. 35 (1941), p. 624.

¹² *Ibid.*, p. 623. The writer has discussed the legal force of the Kellogg Pact, this JOURNAL, Vol. 27 (1933), p. 39 ff. The Argentine Anti-War Treaty (1933) obliged the parties not to wage wars of aggression, not to resort to violence to settle territorial questions, not to recognize fruits of aggression, and not to intervene except as required by other collective treaties to which they were parties, but to adopt "in their character of neutrals a common and solidary attitude" for the maintenance of peace, using "political, juridical or economic means authorized by international law." Georg Cohn (*Neo-Neutrality*, New York, 1939, pp. 133-134) considers it "in every respect a counterpart to the Kellogg Pact . . . not only in its wording but also in its purpose to act as a link between the sanctions system of the League and the non-member states." See also Philip Jessup, *Neutrality, Its History, Economics and Law*, New York, 1936, Vol. 4, p. 175 ff.

¹³ *Supra*, note 3.

of Lords debate on the Budapest Articles of Interpretation (February 1935):¹⁴

This article (4) of the Articles of Interpretation seems, then, to be entirely consistent with Mr. Kellogg's explanatory note of 23, 1928, which was accepted fully at the time by all the governments to which it was addressed, including His Majesty's Government. I think, therefore, fairly conclude that the other Articles of Interpretation, in stating that any signatory may take any of the actions mentioned, which are those of a belligerent and not of a neutral, a violator of the Pact, is fairly interpreting the meaning attached by all its signatories. What, however, the Pact does not say, and the Budapest Articles also most properly do not say, is that such action *shall* be taken against a violator of the Pact.

QUINCY WRIGHT

THE EFFECTS OF RECOGNITION

The brilliant article on "Recognition in International Law," by the distinguished political scientist, Dr. Hans Kelsen, in the preceding issue of the *JOURNAL*¹ deserves careful consideration. It is a most able presentation of the theory that the act of recognition virtually constitutes the legal existence of the recognized state vis-à-vis the recognizing state.

This theory, denoted as "constitutive," has few supporters and has been definitely rejected by the *Institut de Droit International* at its session in Brussels in 1936. The arguments in favor of this theory have never been presented more ably than by Dr. Kelsen. Anyone who ventures to enter the lists with Dr. Kelsen must be well skilled in the dialectic art. The author of this comment does not feel quite equal to this bold contest. After a special study of the problem of recognition, he does feel it desirable, however, to point out what seem to be the main arguments in favor of the opposite and generally accepted theory that the act of recognition is mainly a declaration in effect, a "constatation" of an already existing international situation.

It is true that many decisions by United States courts have failed to point out clearly for this declaratory principle. They have said that recognition is primarily a political function in which the judiciary should not interfere. The legal confusion resulting from this attitude has been most unfortunate and many individual rights have suffered as a consequence. It is of its importance that the question should be clarified. Dr. Kelsen's article has reopened the whole issue anew.

The main difficulty with the constitutive theory is that it is mere legalism. It is not realistic and solidly based on actual practice. One wonders sometimes just how much consideration is due to political theorists. As

¹⁴ Parliamentary Debates, House of Lords, Feb. 20, 1935, quoted in International Association, Report of the Thirty-eighth Conference, Budapest, 1934, p. 322.

¹ October, 1941, Vol. 35, p. 605.

may well theorize concerning the behavior of the atom. A doctor may advance a theory to explain the action of a serum or drug. But a theory remains a theory until it can be proven by experiment. Just how one can experiment with the constitutive theory of recognition is certainly most puzzling.

The declaratory theory is not so much a theory as a principle tested in the laboratory of experience and precedence. The issue concerns simply what happens when a recognized state meets with a new international entity. If people have grouped together for a political purpose, on a given territory, and are independent, it would be obviously absurd to say that they do not exist. If the inhabitants, ships and other possessions are subject to contacts, contracts and controversies, the situation demands something else than a theoretical approach. It is a *de facto* situation.

The basic principle at stake in this entire problem of recognition is the principle of continuity in the life of a state. The Civil War cases decided by the United States courts were based on the fact that there can be no legal vacuum in the life of peoples—either in domestic or external relations. People marry; children are born; wills are made; contracts entered into, etc., etc. Legal relations are constantly established with legal effects independent of any act of recognition. Whether one likes the situation or not from the political or moral angle, a state is compelled diplomatically or judicially to take notice *de facto* or *de jure* of the existence of another state. Any other attitude lends to such absurdities of pretending that at a given moment something does not exist and, then, by a magic flourish of a pen, it comes into being—as if you revived a mummy.

The other important principle involved is that recognition must necessarily be a *political* act having only attenuated legal consequences, such as treaty relations. There have been instances, such as the creation of Czechoslovakia, when states have been recognized before they were actually created. The relations of states are normally conducted by the heads of states who determine the form and the extent of recognition as a political, diplomatic act. The courts cannot assume this function. Nevertheless they cannot indulge in foolish fictions and ignore the legal effects of human relationships throughout international society.

In rejecting the constitutive theory, the *Institut de Droit International* at its session in Brussels in 1936 paid homage to the principle that "the independence and juridical equality of states demand respect for the right of nations to organize freely or to change their institutions." It was deemed abhorrent that sovereign acts by any states should be called into question because of a failure to obtain formal recognition. The *Institut* went so far even as to hold that the extraterritorial effects of acts by a non-recognized state do not depend on a formal act of recognition. "Even in the absence of recognition, they should be acknowledged by the competent jurisdictions

and administrations when, considering especially the actual character of the power exercised by the new government, these effects are in conformity with the interests of good justice and the interest of individuals."²

With all due respect to the scholarship and intellectual acumen of Dr. Kelsen, it would seem clear that the constitutive theory remains only a theory having slight relation to facts and precedents. Its main value is in forcing the international jurists to formulate in clearer terms the inescapable conclusions (1) that the act of recognition is essentially a political, diplomatic function having only slight legal consequences, and (2) that the courts are relatively free to consider all the facts relating to acts by a non-recognized state or government.

PHILIP MARSHALL BROWN

RECOGNITION AND NON-RECOGNITION

Professor Kelsen in an illuminating article published in the October issue of this JOURNAL, entitled "Recognition in International Law, Theoretical Observations,"¹ has given expression to certain ideas which seem to warrant discussion. Professor Kelsen makes a distinction between *legal* and *political* recognition, holding the former to be an act of "cognition," the establishment of the *fact* of statehood (or government) which without it would not exist in an international sense, and the latter, the expression of a willingness to enter into political relations with the thus recognized state or government, an act which Kelsen regards as purely optional, discretionary and indeed arbitrary. He suggests that legal recognition is constitutive, bringing the state into existence in the international sense, and that it is not a state until the fact of statehood is recognized by an authoritative organ of the international community, *i.e.*, another state or states. Political recognition, on the other hand, is merely declaratory of a pre-existing legal statehood or government, and may be followed by further diplomatic relations, such as the exchange of ambassadors, treaties, etc.

This editor ventures, with great respect, to question the existence of the distinction posited and its practical importance, if it did exist. There is, it is believed, a real distinction between the legal obligation to recognize new states or governments and the political performance of that obligation, but this is not the distinction which Kelsen advances. If I understand him correctly, he suggests that you cannot admit the fact of statehood unless some organ of the international community, generally other states or some organization entrusted with that function, puts upon it the imprimatur of perception or cognition or acknowledgment. But this seems hardly consistent with the practice of states or the facts of life. Can you not establish the existence of a fact unless someone pronounces it to be a fact? We think we

² Art. 17. The English version of the Institut's resolutions on the subject is printed in this JOURNAL, Supplement, Vol. 30 (1936), p. 185.

¹ Vol. 35 (1941), p. 605.

know what is a hostile act, an act of war, whether any state admits it to be such or not. Such acts do not depend upon the names or labels assigned. The United States is disposed to date its existence as a state from July 4, 1776, although presumably no other state had acknowledged its existence at that time. Manchukuo exists whether the fact is recognized or not. So war, like disease, is a fact, recognized or not. The assumed analogy that an act of plunder is theft only after a court so pronounces, seems unconvincing.

Let us assume *ex hypothesi* that international law, as Kelsen says, must determine what a state is and that the indicia of statehood may be catalogued. Kelsen maintains that only after a legal act of recognition is international law applicable to a community. This may be ambiguous. We do know that for many years the United States refused to admit the existence of the Soviet Government, by recognizing the Kerensky Government as the authorized legal government of Russia and by refusing to receive Soviet representatives. Yet the courts, having to deal with conditions and not theories, had to concede that the Soviet Government had the physical and legal power to change legal relations in Russia² and the Soviet Government in 1924 obtained immunity from the jurisdiction of the New York Court of Appeals.³ It took that court over ten years to dissipate its own illusion that the power of the Soviets to affect legal relations in Russia was dependent on political recognition of the Soviets by the United States.⁴ But if *legal* recognition as distinguished from political recognition is an operative or evidentiary act, how is it manifested? In what way does international law endow the legal as distinguished from the political act of recognition with legal consequences? True, it is greatly disputed as to how political recognition may be manifested—whether expressly only or by implication. Many persons regard the fact that both Soviet Russia and the United States signed or adhered to the Kellogg Pact as an act of recognition by the United States.⁵ Others deny that, claiming intent to be the operative element.

Professor Kelsen remarks that international law has no special organ to determine the operative facts which condition "legal" recognition, leaving each state an organ of the international community for this purpose. The inconvenience of differing opinions and policies on the facts may be premitted.⁶ But it seems awkward to suggest the analogy that an injured state often decides for itself what are its rights under international law and then undertakes to enforce its own determination. This is one of the con-

² *Luther v. Sagor*, [1921] 3 K. B. 532.

³ *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 138 N. E. 24 (1923).

⁴ *Cf. Vladikavkazsky Railway Co. v. New York Trust Co.*, 263 N. Y. 369 (1934), and Nebolsine, "The Recovery of the Foreign Assets of Nationalized Russian Corporations," 39 Yale L. J. 1130 (1930).

⁵ *Cf. John Bassett Moore*, "Candor and Common Sense," An Address Delivered at the Bar Association of New York City, 1930, p. 13.

⁶ Or is "legal" recognition, in Kelsen's view, obligatory?

ceded weaknesses of international law, demonstrating its somewhat primitive character. But critics and commentators—not outside states—review the facts and try to evaluate them in their relation to law. The injured state can only in a loose sense be said to have been “empowered” by international law to decide the question; better expressed, international law has no assured means of preventing states from acting on their own view of their rights. There are innumerable factors, including precedents, which operate to induce self-restraint. The indicia of statehood are determined and established by objective facts, not by subjective recognition.⁷ These objective facts or conditions are indeed listed by Professor Kelsen, and they hardly seem to require third party recognition to establish their existence. Judicial experience of the Soviet Government in United States and other courts seems to show that even *before* recognition, “legal” or political, a community legally exists and must be accepted as such by foreign courts. The reason is that, like any *de facto* government or régime, it has the power to change legal relations in the place where it exists, and that power must be admitted and acknowledged. Whether this is called its “natural” existence or its “legal” existence, makes little difference. Its actual existence is important to all those who must come into contact or relations with it. It may have been “created” by nature or by force, but hardly, even for international purposes, by the recognition of a third State, whether called “legal” or “political.”⁸

When we come to “political” recognition, which is the only kind of recognition that in our opinion is worth discussing, other factors come into consideration. While maintaining that international law establishes the norms by which statehood may be determined, Kelsen nevertheless concludes that “international law is not violated if the competence to recognize a community as a state is not exercised.” This seems subject to serious question. If, as Kelsen correctly says, *premature* recognition of revolting insurgents is an offense to the parent state and therefore violative of international law as an act of political intervention,⁹ why is not *tardy* recognition wrongful? With this situation Kelsen fails to deal, relying on the common assumption that recognition is a voluntary political act free from legal control. But it is submitted that this is not so. A new state, like a new star in the firmament, is not like a candidate for admission to a social club and therefore subject to blackball. If it actually exists and promises continuity it has, it is submitted, a legal *right* to recognition, and the failure to extend it by other states is a breach of duty, a legal wrong. There may be no way except the

⁷ Cf. Sir John Fischer Williams, “Some Thoughts on the Doctrine of Recognition in International Law,” 47 Harv. L. Rev. 776 (1934); also Arnold Raestad in 17 *Rev. Dr. Int. et Lég. Comp.* 257 (1936).

⁸ We are accustomed, inaccurately, to speak of the status of a state before international recognition as *de facto*. An analysis of this misconception was attempted in an article “The Unrecognized Government in American Courts,” this JOURNAL, Vol. 26 (1932), p. 261.

⁹ Cf. Moore, *Digest of International Law*, I, 73.

exertion of reprisals to compel the performance of this legal duty, a fact which is true of many of the duties of international law. International law is a normative science, but law none the less. Italy was entirely justified in withdrawing the exequaturs of certain German consuls in 1860 when certain German states persistently refused to recognize Italy as a state.¹⁰ The refusal to do what there is a legal duty to do is an act of intervention, a politically hostile act subject to all the consequences of such an act. As Thomas Baty remarks, the teacher cannot say to her pupil, "Your sum is right, if you will promise to be a good girl."¹¹ This does not militate against the fact that a difference is often posited between *actual* or *factual* recognition, on the one hand, and *political* recognition on the other. This is not the distinction Kelsen makes, although it may be that this is what he means. The recognition of a state or government is essentially the recognition of a fact; but for political reasons an outside state may decline to "recognize" that fact. Both "recognitions" are political acts, the former possibly provisional, the latter, conclusive, sometimes erroneously distinguished by the words *de facto* and *de jure* recognition.

A fortiori, the doctrine of non-recognition is not a legal doctrine but a program of political intervention, of sanctions, subject to all the risks and dangers of intervention. Elsewhere, I have endeavored to prove that the doctrine of non-recognition is fraught with disintegrating effects and, however high-minded its alleged purposes, is not worth the constant incitement to hostility and war which it embodies.¹² The fact that recognition is a political act has resulted in the unfortunate assumption that it may be arbitrarily and yet lawfully withheld, even when earned by the test of physical existence. This fallacy has done great harm.

Needless to say, the writer has profound admiration for the juristic and professional achievements of Professor Kelsen. The present editorial is submitted, not as a challenge to that distinguished jurist, but in the modest attempt to clarify a subject long nurtured in confusion.

EDWIN BORCHARD

INTERNATIONAL LEGISLATION

In 1916 the American Philosophical Society held a "Symposium on International Law; its Origin, Obligations, and Future."¹ This was undoubtedly a bold program under conditions prevailing in April, 1916, a year before the United States entered the World War. The symposium indicated, however, that the roots of international law were deep in the past, that the development of human relations rested upon law, and that in the application

¹⁰ Moore, *op. cit.*, p. 72.

¹¹ Baty, "So-called *De Facto* Recognition," 31 Yale L. J. 470 (1921).

¹² *Legal Problems in the Far Eastern Conflict*, Institute of Pacific Relations, 1941, p. 157 *et seq.*

¹ LV American Philosophical Society, 291.

of law there would be conflicts of opinion as to its obligatory force and that there were in April 1916 many who affirmed that international law was no more.

The existence of war had for years proven the need of international law, and laws for the conduct of warfare had been formulated. The increase of taxes to defray uneconomic expenses of war had been borne, but reluctantly. Reparation plans had proven illusory. The deprivation of customary means of international relations was quickly felt and after a time resented. National recovery had often been problematical.

Laws between human beings, whether domestic laws or international, to be effective must in the long run have a foundation in human reason, and while for a time there may be differences of interpretation, a common basis is usually ultimately found. It is, therefore, easy to understand why plenipotentiaries of American and European states drew up in 1875 a convention for the establishing of an international bureau of weights and measures, "desiring international uniformity and precision."

Wider extension of the scope of international legislation followed the apparent success of the First Hague Conference of 1899. The Second Hague Conference of 1907, and other international conferences, particularly of American states in the twentieth century, show the changing bases of agreement among states to one of conventional international law.

The range of international law has been steadily broadening. The ancient dictum that "strange air made a man unfree" no longer holds, though in July, 1914, many found themselves traveling in Europe even without passports. Volumes have been written on nationality laws, and treaties between states on this subject are many. Indeed, there has been an attempt even since 1920 to agree upon a codification of the law of nationality.

The twenty years between 1920 and 1940 was a period of increasing international legislation. Not merely the agreements reached at general international conferences, but also the special agreements upon the law which would be binding in relations between two states or between members of small groups have multiplied during the twentieth century. Taking as illustrative a year midway between the Treaty of Versailles and 1940, the year 1930, there were signed as an average about seven agreements each month. This constituted a large body of law formally agreed upon, though it did not include the considerable number of executive agreements or minor instruments less formal in nature. These international agreements of 1930 range in content from the protection of names of cheeses to reduction and limitation of naval armaments. If all the agreements, general and special, for this year 1930 were enumerated, the average number would be about three per week. Other recent years show an increasing tendency to bring under international regulation affairs which might concern two or more states.

The problem of readjustment of international relations is in modern times always present, though the difficulties may vary in nature. In early times,

however, the fortunes of war left the settlement in large measure to the will of the victor. Later, with the developing neighborhood of states, the victor, as a matter of policy, felt obliged to take into consideration the relations of other states. This circle of states expanded with the means of communication, and with the general introduction of radio communication the attitude of remote regions influenced negotiations, and a proposition which in the nineteenth century might depend on the reaction of the personnel of the negotiators now may through radio communication face a national and international reaction. Since this condition prevails, the importance of conventional agreements² already approved has become much more significant.

The first convention registered with the Secretariat of the League of Nations in September, 1920, related to an additional article of the Monetary Convention of May 27, 1873, to which Denmark, Norway and Sweden were parties. While this convention may, except for its place in the order of registration, not be of importance, the nearly 5,000 treaties registered since September, 1920 constitute a body of international legislation of capital importance. The comprehensive material embodied in the two hundred volumes of the *League of Nations Treaty Series* gives ample proof of the development of international legislation in recent years, and at the same time these and other documents ratified and unratified afford a substantial basis making it now unnecessary to start *de novo* in any international negotiation. Further it should be said that many of these documents are the product of long and careful study and deliberation by the ablest draftsmen and statesmen in the foreign offices of the world.

GEORGE GRAFTON WILSON

² See *International Legislation*, edited by Manley O. Hudson, 7 vols., Washington, 1931-1941.

CURRENT NOTES

NOTICE OF THE ANNUAL MEETING OF THE SOCIETY

The thirty-sixth annual meeting of the American Society of International Law will be held at Washington on April 23-25, 1942, in the Carlton Hotel. The question of holding the Society's annual meeting while the United States is at war was considered at a meeting of the Executive Council held at Washington on December 22 last, and the decision in the affirmative was taken after a thorough discussion of all the reasons which were advanced for and against holding the meeting. The question had been raised in view of the course followed by the Society during the last World War when the public annual meetings were omitted in the years 1918, 1919 and 1920, and private meetings of the Executive Council were held instead.

There were present at the meeting of the Executive Council on December 22, 1941, nine members in attendance, and twenty-two letters expressing their views were read from members of the Council who were unable to be present in person. The members who sent their views by letter as well as those in attendance were in favor of holding the meeting by a large majority. In all, the members present and those who sent letters numbered thirty-one of the forty-one members of the Executive Council, or more than three-fourths. This representation obtained on ten days' notice is a gratifying demonstration of the personal interest taken by the members of the Executive Council in the affairs of the Society.

A number of suggestions were made concerning the program, and the Executive Council agreed that the success of the forthcoming meeting will depend more than ever upon the program. It was the consensus of the Council that the program in 1942 should be of a basic nature involving the purpose of the Society "to promote the establishment and maintenance of international relations on the basis of law and justice," with speakers of outstanding prominence. It was also felt that inter-American relations might form a part of such a program. The details were left to the Committee on Annual Meeting. A communication addressed to the membership of the Society by the Chairman of that Committee is printed herein, p. 115.

The Executive Council considered the matter of the physical accommodations of the members who will come to Washington during this period of congestion incident to governmental activities in national defense and in promoting the successful prosecution of the war. The Secretary will be glad to offer the services of his office in arranging accommodations for non-resident members who may wish to come to the annual meeting. A notice regarding the meeting will be sent to the membership as soon as the program and other details have been arranged by the Committee on Annual Meeting.

GEORGE A. FINCH, *Secretary*

ANNUAL MEETING MESSAGE

TO EACH MEMBER OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW:

The main issue of the war is now clear—shall enlightened justice or barbaric force rule the world? For law and justice to prevail we must win the war and win the peace. It is the primary function of the American Society of International Law to help win the peace by courageously planning for a law-governed world. We must not be found wanting in this crisis. With calm determination we must dedicate our lives to the great work of firmly establishing the world-wide reign of peace through justice.

Plan now to be present at the 36th Annual Meeting of our Society, April 23-25, 1942, at the Carlton Hotel, Washington, D. C.

Please send me any suggestions you may have to make regarding topics and speakers. A constructive program is being planned with outstanding speakers, led by our President, Secretary of State Cordell Hull.

The Democracies can and must make long-range plans for the maintenance of world order.

JAMES OLIVER MURDOCK,
Chairman, Committee on Annual Meeting,
1824 23rd Street, Washington, D. C.

DEVELOPING FISHERY PROTECTION

It is said that the Skiriotes case¹ is the inspiration for two fishery bills recently introduced in Congress, the McNary Bill, S. 1712, and the Wallgren Bill, S. 1915. The McNary Bill grants regulatory powers as to salmon "taken in the waters of the Pacific Ocean south of fifty degrees north latitude." The Wallgren Bill grants regulatory powers as to "any fish taken in the waters of the North Pacific Ocean, including the Bering Sea and the Arctic Ocean, north of fifty degrees north latitude." The McNary Bill applies only more than three miles off shore; the Wallgren Bill applies both to Alaska inshore and offshore waters.

There is nothing new in the principle announced in the Skiriotes case that a government has the power to exercise regulatory control over its own citizens and vessels on the high seas. It is the specific application of the principles to offshore fisheries which makes the case important at this time. And this in turn is due to present widespread recognition: first, that the old idea of the inexhaustibility of deep sea fisheries is, from a commercial standpoint, definitely fallacious as to many varieties of fish; second, that regulation for only three miles from shore will not suffice, therefore either national or international control must be exercised beyond that distance (in some situations very promptly) if the great food reservoir of the sea is to be utilized in such manner as to furnish the enormous annually recurrent food supply which it is capable of producing and which under adequate regulation can be made perpetual.

¹ *Skiriotes v. Florida*, 61 S. Ct. 924 (1941); this JOURNAL, Vol. 35 (1941), p. 569.

Most of the valuable saltwater fisheries are found in that comparatively small part of the ocean extending from the shore line out to the edge of the continental shelf. The fishermen of a nation are naturally more numerous over that part of the continental shelf bordering their own shore. Enforced restraint, therefore, by a nation over its own citizens and vessels may be beneficial. However, with the development of modern long-range vessels, including the so-called "mother-ships"—floating canneries, cold storage or reduction plants, each accompanied by a fleet of fishing boats—which can cruise thousands of miles and be independent of the shore for an entire season, this control limited to a nation's own citizens and vessels is not a sufficient answer to the demand for fishery conservation.

What then can be done? Various suggestions have been advanced: first, obtain the unanimous consent of all nations of the world to some plan; second, secure such regulatory control as is possible through bilateral or multilateral treaties; third, unilaterally abandon the three mile policy and substitute (a) a greater fixed distance, six, twelve, or a hundred miles, or (b) adopt the edge of the continental shelf as the boundary of territorial waters; or fourth, in specific situations assert special rights, as for example in the case of the American side of the North Pacific. There Canada and the United States for many years were exclusive in the prosecution of all the fisheries, and for the last several decades have been spending large amounts of public money on fishery conservation, at the same time subjecting their own fishermen to rigid regulation.

As to the third and fourth suggestions, consideration might be given to the contention that the three mile policy may properly apply to the general question of sovereignty, but, nevertheless, under proper interpretation of international law, not prevent a nation from exercising an inherent right to protect its domestic economy by exerting such exclusive control of the fisheries adjacent to its coast as exigencies require.

Whether or not any of the specific suggestions advanced afford a solution, surely the lawyers of Canada and the United States must possess sufficient ingenuity to find some adequate answer. Certainly humanity must not be told to fold its hands and blandly reconcile itself to the willful destruction of one of the world's largest and most wholesome food resources unless such an utterly impossible prerequisite as securing the unanimous consent of all nations on the globe can be fulfilled. Right now the whole field of international law is in a state of flux. Why not take advantage of the situation, recognize that a world-wide agreement is impossible, and devise some practicable system for North America, or, better yet, a hemispheric formula which will make the international law of these regions, at least, synchronize with actualities.

EDWARD W. ALLEN

THE UNITED STATES-MEXICAN SETTLEMENT

The Department of State announced on November 19, 1941, the substance of a series of agreements between the United States and Mexico in settlement of certain outstanding questions between the two countries, including pecuniary claims of the United States against Mexico.¹ The claims include the so-called general claims, which were presented to the General Commission established under the convention of September 8, 1923, the agrarian claims arising out of the seizure of American-owned agricultural lands since August 30, 1927, and the petroleum claims arising out of the expropriation of the American petroleum properties in 1938.

The general claims above mentioned include claims arising subsequent to January 1, 1869, the date of the exchange of ratifications of the claims convention of 1868. An attempt was made to adjudicate these claims under the convention of 1923, but, after several extensions, it expired in 1931, the Commission disbanded and the work was discontinued. By the protocol of April 24, 1934, the two governments agreed to continue the arbitration in a modified form before two commissioners, one appointed by each government. The Commissioners decided about 40 American claims, about 85 Mexican claims, and dismissed about 225. They were unable to complete their consideration of the remaining 1070 general claims before the protocol expired.

The agrarian claims were referred by an exchange of notes dated November 9/12, 1938, to an agrarian commission composed of two members, one appointed by each government, which has been engaged in the appraisal of these claims since its organization in December, 1938.

In the settlement of both the general and the agrarian claims, Mexico has agreed to pay \$40,000,000, of which \$3,000,000 have been paid. The remainder is to be paid, \$3,000,000 on exchange of ratifications and \$2,500,000 annually thereafter.

Negotiations over the confiscation of petroleum properties² have been going on between the American companies and the Mexican Government since 1938, under the good offices of the Department of State. During the past year, however, the Department took up the problem with the Mexican Government, which discussions have resulted in the present arrangement. In essence it is a plan for the determination of the value of the expropriated properties, rights and interests, by two appraisers, one appointed by each government. The oil companies retain full liberty of action as to the course they will pursue, before, during and after the valuation proceedings, which must be completed within six months. If the appraisers cannot agree, the two governments will endeavor to reach a settlement through diplomatic channels. Mexico made a deposit of \$9,000,000 on account of the proposed settlement.

¹ See editorial in this JOURNAL, Vol. 30 (1936), p. 99.

² See editorial in this JOURNAL, Vol. 32 (1938), p. 519.

In consideration of the claims settlements, the United States has agreed to negotiate a reciprocal trade agreement, to coöperate in stabilizing the Mexican peso by the purchase of pesos with United States dollars, and has further agreed to purchase newly-mined Mexican silver directly from the Mexican Government on a basis similar to prior practice, and to extend credits through the Export-Import Bank to Mexico for the construction of highways as a part of the Inter-American Highway. The bank will consider sympathetically other requests for credits for developments in Mexico.

L. H. WOOLSEY

REPEAL OF UNITED STATES NEUTRALITY ACT

STATEMENT OF THE SECRETARY OF STATE BEFORE THE COMMITTEE ON FOREIGN AFFAIRS OF THE HOUSE OF REPRESENTATIVES, ON H. J. RES. 237¹

The purpose of this bill is to repeal Section 6 of the Neutrality Act of 1939 prohibiting the arming of our merchant vessels engaged in foreign commerce. The provisions of this section had their origin in Section 10 of the Act of 1937, which had made it unlawful for American vessels engaged in commerce with a "belligerent" state to be armed. The Act of 1939 broadened that provision by making it unlawful for an American vessel engaged in commerce "with any foreign state" to be armed. This makes it impossible for American merchant vessels to defend themselves on the high seas against danger from lawless forces seeking world domination.

The Neutrality Acts did not remotely contemplate limiting the steps to be taken by this country in self-defense, especially were there to develop situations of serious and immediate danger to the United States and to this hemisphere. There was never any thought or intention to abandon to the slightest extent the full right of our necessary self-defense.

At the time when these Acts were passed many people believed that the reliance could be placed on established rules of warfare. One of those rules was and is that merchant vessels, while subject to the belligerent right of visit and search, should not be sunk except under certain specified conditions and limitations. We remembered then, as we do now, what had happened during the ruthless submarine warfare of the World War. We attached importance, however, to the fact that during the years that followed the World War an effort was made to reduce to binding conventional form certain rules theretofore understood to be binding on belligerents. In the London Naval Treaty of 1930, provisions were incorporated in Part IV stating that the following were accepted as established rules of international law:

(1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a war-

¹ Department of State Bulletin, Oct. 18, 1941 (Vol. V, No. 121), p. 291.

ship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

The action taken was the outgrowth of steps initiated at the Conference on the Limitation of Armament held in Washington in 1921-1922. In 1936 the above quoted rules were incorporated in a protocol concluded at London—which was signed or adhered to by 47 nations, including the United States, Great Britain, France, Germany and Italy.

Despite this solemn commitment of the Powers as to the rules which should govern submarines, the German Government is today, and has been throughout the course of the present war, sinking defenseless merchant vessels, including vessels of the United States and of other American republics, either without warning or without allowing the passengers and crews a reasonable chance for their lives. We are, therefore, confronted with a situation where a gigantic military machine has been thrown against peaceful peoples on land and on sea in a manner unprecedented in the annals of history. Submarines, armed raiders, and high-powered bombing planes are inflicting death and destruction in a manner which would put to shame the most ruthless pirates of earlier days.

The provisions of Section 6 of the Neutrality Act are not called for under international law. They were adopted by our own choice. They now serve no useful purpose. On the contrary, they are a handicap. They render our merchant vessels defenseless and make them easier prey for twentieth century pirates.

It is our right to arm our vessels for purposes of defense. That cannot be questioned. We have, since the beginning of our independent existence, exercised this right of arming our merchant vessels whenever, for the purpose of protection, we have needed to do so. For example, in 1798 when depredations on our commerce were being committed by vessels sailing under authority of the French Republic, the Congress, after the expulsion of the French consuls from the United States, passed, upon recommendation of President Adams, an Act permitting the arming of our merchant vessels for the purpose of defense against capture as well as to "subdue and capture" any armed vessel of France. The courts of France then held that the arming of American vessels for these purposes did not render such vessels liable to condemnation when captured by French men-of-war.

In addition to what I have just said it is well known that since Section 6 of the Neutrality Act was adopted, entirely new conditions have developed. Section 6 must, therefore, be reconsidered in the light of these new conditions and in the light of later legislation and executive responsibilities thereunder.

The new conditions have been produced by the Hitler movement of world invasion. Hitler is endeavoring to conquer the European and African and other continents, and he therefore is desperately seeking to control the high seas. To this end he has projected his forces far out into the Atlantic with a policy of submarine lawlessness and terror. This broad movement of conquest, world-wide in its objectives, places squarely before the United States the urgent and most important question of self-defense. We cannot turn and walk away from the steadily spreading danger. Both the Congress and the Executive have recognized this change in the situation. The Congress has enacted and the Executive is carrying out a policy of aiding Great Britain and other nations whose resistance to aggression stands as the one great barrier between the aggressors and the hemisphere whose security is our security.

The theory of the neutrality legislation was that by acting within the limitations which it prescribed we could keep away from danger. But danger has come to us—has been thrust upon us—and our problem now is not that of avoiding it but of defending ourselves against a hostile movement seriously threatening us and the entire Western Hemisphere.

The blunt truth is that the world is steadily being dragged downward and backward by the mightiest movement of conquest ever attempted in all history. Armed and militant predatory forces are marching across continents and invading the seas, leaving desolation in their wake. With them rides a policy of frightfulness, pillage, murder and calculated cruelty which fills all civilized mankind with horror and indignation. Institutions devoted to the safeguarding and promotion of human rights and welfare built up through the ages are being destroyed by methods like those used by barbarian invaders sixteen centuries ago.

To many people, especially in a peace-loving country like ours, this attempt at world conquest, now proceeding on an ever-expanding scale, appears so unusual and unprecedented that they do not at all perceive the danger to this country that this movement portends. This failure to realize and comprehend the vastness of the plan and the savagery of its unlimited objectives has been, and still is, the greatest single source of peril to those free peoples who are yet unconquered and who still possess and enjoy their priceless institutions. If the sixteen nations that already have been overrun and enslaved could break their enforced silence and speak to us, they would cry out with a single voice, "Do not delay your defense until it is too late."

The Hitler Government is engaged in a progressive and widening assault carried out through unrestricted attacks by submarines, surface raiders and aircraft at widely separated points. The intent of these attacks is to intimidate this country into weakening or abandoning the legitimate defenses of the hemisphere by retreating from the seas. In defiance of the laws of the sea and the recognized rights of all nations, the Hitler Government has presumed to declare on paper that great areas of the ocean are to be closed, and

that no ships may enter those areas for any purpose except at peril of being sunk. This pronouncement of indiscriminate sinking makes no distinction between armed and unarmed vessels, nor does the actual practice of the German Government make any such distinction. Since vessels are thus sunk whether armed or unarmed it is manifest that a greater degree of safety would be had by arming them. Moreover, Germany carries her policy of frightfulness, especially in the Atlantic, far outside of these paper areas.

We are confronted with a paramount problem, and we must be guided by a controlling principle. The problem is to set up as swiftly as possible the most effective means of self-defense. The principle is that the first duty of an independent nation is to safeguard its own security.

In the light of these considerations, further revision of our neutrality legislation is now imperatively required. Now, as in earlier times, necessary measures on land and sea for the defense of the United States and of the other independent nations of this hemisphere must be taken, in accordance with the wise, settled and traditional policy of our republic.

Provisions of the Neutrality Act must not prevent our full defense. Any that stand in the way should be promptly repealed. I support the pending proposal to repeal Section 6. My own judgment is that Section 2 also should be repealed or modified.

We are today face to face with a great emergency. We should not sit with our hands tied by these provisions of law.

If Hitler should succeed in his supreme purpose to conquer Great Britain and thus secure control of the high seas, we would suddenly find the danger at our own door.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 15–NOVEMBER 15, 1941

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Europe*, L'Europe Nouvelle; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *R. A. I.*, Revue aéronautique internationale; *U. S. T. S.*, U. S. Treaty Series.

May, 1941

- 26 EGYPT—GREAT BRITAIN. Exchanged notes at Cairo regarding trade between Cyprus and Egypt. Text: *G. B. T. S.*, No. 16 (1941), *Cmd.* 6305.

June, 1941

- 24–September 26 GERMANY—UNITED STATES. Exchanged notes regarding United States claims of \$2,967,092, in the matter of the sinking of the *Robin Moor*. Texts: *N. Y. Times*, Nov. 4, 1941, p. 4; *D. S. B.*, Nov. 8, 1941, pp. 363–364.

August, 1941

- 16 CANADA—UNITED STATES. President Roosevelt issued a proclamation amending regulations of the Migratory Bird convention of Aug. 16, 1916. *D. S. B.*, Aug. 23, 1941, p. 158.
- 16 GREAT BRITAIN—SOVIET RUSSIA. Signed commercial agreement. Text of communiqué: *N. Y. Times*, Aug. 18, 1941, pp. 1–2; *London Times*, Aug. 18, 1941, p. 4.
- 16 MEXICO—UNITED STATES. President Roosevelt issued a proclamation amending regulations of the Migratory Birds and Game Mammals convention of Feb. 7, 1936. *D. S. B.*, Aug. 23, 1941, p. 158.
- 21 CONSULS IN FRANCE. Germany asked all consular officers to leave occupied France by Sept. 1. *B. I. N.*, Sept. 6, 1941, p. 1189.
- 21/24 GREAT BRITAIN—UNITED STATES. Text of joint statement forwarded to United States Congress by President Roosevelt concerning his meeting with Prime Minister Churchill: *Cong. Record* (daily), Aug. 21, 1941, pp. 7380–7381; *H. Doc.* 358 (77th Cong. 1st sess.). Text of Mr. Churchill's radio address of Aug. 24: *N. Y. Times*, Aug. 25, 1941, p. 4; *London Times*, Aug. 25, 1941, p. 5.
- 23 GERMANY—MEXICO. Mexico withdrew recognition of German consuls following closing of Mexican consulates in France as required by Germany. *B. I. N.*, Sept. 6, 1941, p. 1180.
- 25 ARGENTINA—ITALY. Signed agreement at Buenos Aires relative to the purchase of Italian ships laid up in Argentine ports. Text: *Argentine News* (Buenos Aires), Oct. 1, 1941, pp. 4–5.
- 25–October 19 IRAN. British and Soviet military forces made simultaneous advances into Iran on Aug. 25. *N. Y. Times*, Aug. 26, 1941, p. 1. Text of the two governments'

statements: p. 4. The new Iranian Government, which came into power Aug. 28, agreed Sept. 9 to the expulsion of Axis legations' staffs and surrender of their nationals. *N. Y. Times*, Sept. 10, 1941, p. 8; *London Times*, Sept. 10, 1941, p. 4. On Sept. 17 Mohammed Riza was sworn in as Shah on the abdication of his father. *N. Y. Times*, Sept. 18, 1941, p. 3; *London Times*, Sept. 19, 1941, p. 4. On Sept. 20 the Iranian Government pledged a pro-Allied policy. *N. Y. Times*, Sept. 21, 1941, p. 24. Withdrawal of troops from Teheran began Oct. 19. *London Times*, Oct. 20, 1941, p. 3.

- 27 JAPAN—UNITED STATES. Japan announced formal representations had been made to the United States and Soviet Russia against shipment of high octane gas from the United States to the Soviet Union, via Vladivostok. *N. Y. Times*, Aug. 28, 1941, p. 3. Russian statement in reply: *London Times*, Aug. 28, 1941, p. 3.
- 28/September 10 SHIP SEIZURES. Inter-American Financial and Economic Advisory Committee announced a plan, approved by all the American governments, for use of foreign-flag merchant vessels lying inactive in American ports. Text: *D. S. B.*, Aug. 30, 1941, pp. 165-166; this JOURNAL, Supp., Vol. 35 (1941), p. 200. Uruguayan decree ordered seizure of four Italian and Danish ships. *N. Y. Times*, Sept. 11, 1941, p. 13.

September, 1941

- 2 SHIP SEIZURES. President Roosevelt signed Executive Order No. 8881 (6 F.R. 4551) amending Executive Order No. 8771 of June 6, 1941, so that provisions shall apply to all foreign merchant vessels, lying idle in waters under United States jurisdiction, including Philippine Islands and the Canal Zone, at any time after June 6, 1941, and up to and including June 30, 1942. *D. S. B.*, Sept. 6, 1941, p. 180; this JOURNAL, Supp., Vol. 35 (1941), p. 229.
- 4 POLAND—UNITED STATES. President Roosevelt authorized lease-lend aid to the Polish government-in-exile. *N. Y. Times*, Sept. 5, 1941, p. 3; *D. S. B.*, Sept. 6, 1941, p. 181.
- 4/6 GERMANY—UNITED STATES. *U.S.S. Greer*, a destroyer bound for Iceland, was attacked by a German submarine. *N. Y. Times*, Sept. 5, 1941, p. 1. The official German news agency admitted the encounter and claimed the United States vessel was the aggressor in a German designated blockade zone. *N. Y. Times*, Sept. 7, 1941, p. 1.
- 5 POLISH GOLD. The Central Bank of Poland obtained a writ of attachment on the Federal Reserve Bank of New York, in its capacity of custodian of one billion dollars of French gold under earmark in the United States. *N. Y. Times*, Sept. 6, 1941, pp. 1, 6; *Washington Post*, Sept. 8, 1941, pp. 1, 6.
- 7 FRANCE. A decree was issued at Vichy, setting up a Special Court of Political Justice to deal with persons responsible for the war. *B. I. N.*, Sept. 20, 1941, p. 1239.
- 9 GREAT BRITAIN—UNITED STATES. Signed commercial agreement in Washington. *N. Y. Times*, Sept. 10, 1941, pp. 1, 12.
- 10 CANADA—CHILE. Signed trade pact at Santiago de Chile. *N. Y. Times*, Sept. 11, 1941, p. 12.
- 11 ROOSEVELT, F. D. In a radio address President Roosevelt stated he had ordered the navy to shoot on sight any Axis raider entering United States defense waters. Text: *N. Y. Times*, Sept. 12, 1941, pp. 1, 4.
- 13 HAITI—UNITED STATES. Signed executive agreement at Port-au-Prince regarding financial relations. *N. Y. Times*, Sept. 14, 1941, p. 5; *D. S. B.*, Sept. 13, 1941, p. 214.

- 15 EUROPEAN WAR—UNITED STATES. Secretary of the Navy Knox, in a radio address, announced that beginning Sept. 16 the United States Navy would provide all possible protection for vessels of all nations carrying lend-aid supplies between America and Iceland. *N. Y. Times*, Sept. 16, 1941, p. 1. Text of speech: p. 4.
- 15 GREAT BRITAIN—TRANS-JORDAN. Communiqué announced unity of interests in the war. *N. Y. Times*, Sept. 16, 1941, p. 10.
- 15 INTER-AMERICAN CONGRESS OF MUNICIPALITIES. 2d Congress opened at Santiago, Chile. *N. Y. Times*, Sept. 16, 1941, p. 13.
- 15-24 INTER-AMERICAN TRAVEL CONGRESS. 2d Congress met at Mexico, D. F. Text of Final Act: *U. S. Congress and Conference Ser.* No. 36.
- 16 AUSTRALIA—CHINA. 1st Chinese Minister to Australia presented his credentials. *London Times*, Sept. 17, 1941, p. 3; *B. I. N.*, Oct. 4, 1941, p. 1301.
- 16 BULGARIA—TURKEY. Ankara announced receipt of a formal démarche requesting passage for Bulgarian warships through the Dardanelles, which was denied by the Turkish Government. *N. Y. Times*, Sept. 18, 1941, pp. 1, 3; Sept. 19, p. 3.
- 16 GERMANY—PANAMA. The Government of Panama ordered its Minister to Germany to protest against the torpedoing of the steamships *Sessa* and *Montana*, and to present a claim for indemnity. Text of note: *N. Y. Times*, Sept. 17, 1941, p. 8.
- 16-October 3 ECUADOR—PERU. The Peruvian Government admitted on Sept. 16 bombing of Ecuadorean territory as a reprisal and safety measure. *N. Y. Times*, Sept. 17, 1941, p. 7; Sept. 18, p. 6. Mexico formally proposed on Sept. 18 a collective Pan American effort to settle the dispute. *N. Y. Times*, Sept. 19, 1941, p. 5. Official announcement was made on Oct. 3 of agreement upon a neutral zone. *N. Y. Times*, Oct. 4, 1941, p. 5.
- 17 AXIS POWERS—EGYPT. Egypt sent notes to Germany and Italy protesting the bombing of Cairo. *N. Y. Times*, Sept. 18, 1941, p. 2.
- 17 GREAT BRITAIN—SWITZERLAND. The British Government made payment of 1,110,000 francs to cover damage caused by unintentional dropping of bombs on the night of June 11-12, 1940. *N. Y. Times*, Sept. 18, 1941, p. 8.
- 17 SOVIET RUSSIA—UNITED STATES. The Reconstruction Finance Corporation arranged to provide a 100-million dollars credit for Russia, to be repaid in strategic minerals over two or three years. *N. Y. Times*, Sept. 18, 1941, p. 1.
- 17/26 COFFEE. Executive Order No. 8902 prescribed regulations pertaining to entry of coffee into the United States from countries signatories of the Inter-American Coffee Marketing Agreement of Nov. 28, 1940. Text: *D. S. B.*, Sept. 20, 1941, p. 222. Executive Order No. 8909 authorized entry into the United States of bona fide samples of coffee without regard to quota restrictions provided for in the 1940 agreement. Text: *D. S. B.*, Sept. 27, 1941, p. 237.
- 17-October 8 SYRIA. In accordance with the proclamation of June 8, 1941, which set a time limit on the French mandate over Syria, General Catroux declared the independence of Syria, with full sovereignty. Sheik Taj ed-Din was proclaimed 1st President of the Syrian Republic on Sept. 20. *B. I. N.*, Oct. 4, 1941, p. 1320. Independence and sovereignty were proclaimed Sept. 26. *London Times*, Sept. 29, 1941, p. 3. The Commission of Control, appointed in July under the armistice convention, completed its task, according to announcement from Jerusalem on Oct. 8. *N. Y. Times*, Oct. 9, 1941, p. 9.
- 18 MANCHUKUO—SPAIN. Signed treaty of friendship, commerce and navigation at Madrid. *N. Y. Times*, Sept. 19, 1941, p. 4.

- 19 NORWAY—SOVIET RUSSIA. Relations resumed by the Norwegian Government-in-exile and Soviet Russia. *N. Y. Times*, Sept. 21, 1941, p. 17.
- 20 PARAGUAY—UNITED STATES. Signed a lease-lend agreement at Washington. *N. Y. Times*, Sept. 21, 1941, p. 48.
- 22 CUBA—UNITED STATES. President Roosevelt issued proclamation revoking the proclamation of June 29, 1934, which imposed certain restrictions on the exportation of arms to Cuba. *D. S. B.*, Sept. 27, 1941, pp. 235-236.
- 22-October 6 FINLAND—GREAT BRITAIN. British note of Sept. 22 stated Finland would be considered an enemy if its forces invaded purely Russian territory. *London Times*, Sept. 24, 1941, p. 4. Text: Sept. 29, 1941, p. 3. The Finnish reply of Oct. 6 said war with Soviet Russia is without political obligations to Germany. *London Times*, Oct. 8, 1941, p. 3. Excerpts: *N. Y. Times*, Oct. 8, 1941, p. 4.
- 23 FRANCE. London announced formation of a Free French National Council, to be in effect a provisional government. *N. Y. Times*, Sept. 24, 1941, p. 5. Gen. de Gaulle, elected president, named members of the National Advisory Council. *N. Y. Times*, Sept. 26, 1941, p. 5.
- 23 PERMANENT AMERICAN AERONAUTICAL COMMISSION. President Roosevelt named members of the U. S. National Commission of the Permanent Commission, created by resolution of the Inter-American Technical Aviation Conference of 1937. *D. S. B.*, Sept. 27, 1941, p. 238.
- 24 ARGENTINA—CANADA. Diplomatic relations established. *N. Y. Times*, Sept. 25, 1941, p. 5.
- 24 CANADA—CHILE. Diplomatic relations established. *N. Y. Times*, Sept. 25, 1941, p. 5.
- 24 INTER-ALLIED CONFERENCE. Representatives of Great Britain, nine governments-in-exile, and Soviet Russia met for a second conference in London and pledged full adherence to the Atlantic Charter [or Declaration] drawn up by President Roosevelt and Prime Minister Churchill. *London Times*, Sept. 25, 1941, p. 5; *N. Y. Times*, Sept. 25, 1941, p. 1. Text of resolution on supplying necessities to nations after the war: p. 4. Text of statement concerning United States cooperation: *D. S. B.*, Sept. 27, 1941, p. 235; *N. Y. Times*, Sept. 25, 1941, p. 4: Report of Proceedings: *G. B. Misc. No. 3* (1941), *Cmd.* 6315.
- 24 VOLGA REPUBLIC. The Supreme Soviet formally abolished the German Volga Republic and ordered inhabitants to Siberia. (The Republic was a unit of the Russian Socialist Federated Soviet Republic) *N. Y. Times*, Sept. 25, 1941, p. 3.
- 26 FRANCE—SOVIET RUSSIA. Soviet Ambassador in London informed Gen. de Gaulle his government had decided to recognize Gen. de Gaulle as leader of all Free French fighting on the Allied side. *London Times*, Sept. 27, 1941, p. 2.
- 27 AUSTRIA. Formation announced of a Free Austrian National Council, with headquarters in Toronto. A chancellor will represent the Council in Washington. *N. Y. Times*, Sept. 28, 1941, p. 16.
- 27 CZECHOSLOVAKIA—SOVIET RUSSIA. Military agreement signed at Moscow, between Soviet Russia and the Czech government-in-exile. *B. I. N.*, Oct. 18, 1941, p. 1771.
- 29-October 1 GREAT BRITAIN—SOVIET RUSSIA—UNITED STATES. American-British-Russian Aid Conference opened at Moscow on Sept. 29. *N. Y. Times*, Sept. 30, 1941, pp. 1, 4. Conference ended Oct. 1. Texts of U. S.-British statement and Russian communiqué: *N. Y. Times*, Oct. 3, 1941, pp. 1, 2.

- 30 GREAT BRITAIN—TURKEY. Signed agreement concerning export of foodstuffs to the British Empire. *B. I. N.*, Oct. 18, 1941, p. 1784.
- 30 ICELAND—UNITED STATES. United States Minister presented his credentials to the Regent of Iceland. *D. S. B.*, Oct. 25, 1941, p. 315.

October, 1941

- 1 BRAZIL—UNITED STATES. Signed lease-lend agreement. *N. Y. Times*, Oct. 2, 1941, p. 3; *London Times*, Oct. 2, 1941, p. 3.
- 1 FRENCH INDO-CHINA—THAILAND. The Thai Government announced temporary agreement reached in the frontier demarcation conference under which Thailand will receive 27 former French islets in the Mekong River. *N. Y. Times*, Oct. 2, 1941, p. 12.
- 2 ARGENTINA—CANADA. Signed trade agreement at Buenos Aires. *N. Y. Times*, Oct. 9, 1941, p. 7.
- 2 ARMS TRAFFIC. Regulations amended by the Secretary of State governing the international traffic. *D. S. B.*, Oct. 4, 1941, pp. 246-247.
- 4 JAPAN—POLAND. Japan severed relations with the exiled government and announced decision to close its embassy in Warsaw and to regard the Polish embassy in Tokyo as having gone out of existence. *N. Y. Times*, Oct. 5, 1941, p. 16; *London Times*, Oct. 6, 1941, p. 3.
- 6 PRISONERS OF WAR. Great Britain and Germany carried on direct radio broadcasts regarding exchanges of prisoners. *N. Y. Times*, Oct. 7, 1941, p. 1. The negotiations broke down completely. *N. Y. Times*, Oct. 8, 1941, p. 5.
- 6-20 PERU—UNITED STATES. In reply to the Peruvian note of Oct. 6, regarding 18 airplanes requisitioned by the United States while in transit to Peru, Secretary Hull expressed regret for the needful action in his note of Oct. 17. A second note of Oct. 20 stated that compensation would be given to the Peruvian Government. Texts of United States notes: *D. S. B.*, Oct. 25, 1941, pp. 314-315.
- 6/20 SHIP REGISTRY. Panama's Cabinet canceled the ban of Oct. 6 against arming of ships of Panamanian registry. Text of decree: *N. Y. Times*, Oct. 21, 1941, p. 3.
- 6/28 SYRIAN RECOGNITION. Granted by Egypt on Oct. 6 and by Great Britain on Oct. 28. *B. I. N.*, Oct. 18, 1941, p. 1772; *London Times*, Oct. 29, 1941, p. 3.
- 8 SOVIET RUSSIA—UNITED STATES. Official text and German-translated text of President Roosevelt's note to Stalin commending Russian army resistance and promising material assistance: *N. Y. Times*, Oct. 9, 1941, p. 2. Official text: *D. S. B.*, Oct. 11, 1941, p. 276.
- 9 GERMANY—TURKEY. Signed trade agreements at Ankara. *London Times*, Oct. 10, 1941, p. 3; *N. Y. Times*, Oct. 10, 1941, p. 9.
- 9/16 PANAMA. Ricardo A. de la Guardia became President in a bloodless overthrow of the Arias government. *N. Y. Times*, Oct. 10, 1941, p. 1. Text of Secretary Hull's statement of Oct. 16 denying United States' participation in the *coup d'état*: *N. Y. Times*, Oct. 17, 1941, p. 5; *D. S. B.*, Oct. 18, 1941, pp. 293-295.
- 10-11 CANADIAN-AMERICAN JOINT ECONOMIC COMMITTEES. Held 3d meeting in New York. *N. Y. Times*, Oct. 11, 1941, p. 3; Oct. 12, p. 16.
- 11 BULGARIA—ITALY. Berlin announced signature of trade agreements. *N. Y. Times*, Oct. 12, 1941, p. 6.

- 13 COLOMBIA—VATICAN. Agreement reported reached on church-state relations. *N. Y. Times*, Oct. 14, 1941, p. 12.
- 13 HUNGARY—SWITZERLAND. Signed one-year trade agreement at Budapest. *N. Y. Times*, Oct. 14, 1941, p. 13.
- 13 JAPAN—PORTUGAL. Signed agreement at Lisbon establishing air line between Palao in the Japanese-mandated islands, and Dilli, capital of the Portuguese island of Timor. *N. Y. Times*, Oct. 15, 1941, p. 8.
- 14 ARGENTINA—UNITED STATES. Signed trade agreement at Buenos Aires. *D. S. B.*, Oct. 18, 1941, p. 297; *N. Y. Times*, Oct. 15, 1941, p. 7. Effective Nov. 15. *N. Y. Times*, Nov. 1, 1941, p. 7; *D. S. B.*, Nov. 1, 1941, p. 351. Text: *D. S. B. Supplement*, Oct. 18, 1941.
- 14 WHEAT CONGRESS. Representatives of Argentina, Australia, Canada, United Kingdom and United States reconvened at Washington, following the recess from Aug. 3. *D. S. B.*, Oct. 18, 1941, p. 302.
- 16 HUNGARY—TURKEY. Economic agreement announced at Ankara. *N. Y. Times*, Oct. 17, 1941, p. 3.
- 16 ITALY—TURKEY. Trade pact announced at Ankara. *N. Y. Times*, Oct. 17, 1941, p. 3.
- 16 WAR GUILT TRIALS. General Gamelin, ex-Premiers Daladier, Blum, Reynaud and former Minister of Interior Mandel ordered confined in the Pyrenees fortress of Pourtalet following recommendations of the Council of Political Justice. *N. Y. Times*, Oct. 17, 1941, p. 7. Trials opened at Riom on Oct. 20. *N. Y. Times*, Oct. 21, 1941, p. 12.
- 17 BRAZIL—CANADA. Signed trade treaty at Rio de Janeiro. *N. Y. Times*, Oct. 18, 1941, p. 5.
- 17 FRANCE—GERMANY. Agreed in principle to exchange official representatives between Berlin and Vichy. *N. Y. Times*, Oct. 18, 1941, p. 6.
- 17 GREAT BRITAIN—UNITED STATES. Signed convention at Washington relating to taxation of property of the two governments acquired for defense uses. *D. S. B.*, Oct. 18, 1941, p. 302. Text: *Cong. Record* (daily), Nov. 24, 1941, pp. 9281-9282.
- 17-19 GERMANY—SOVIET RUSSIA. The Russian Government and the diplomatic corps moved to Kuibyshev on the Volga. *N. Y. Times*, Oct. 18, 1941, p. 1. Text of Russian order proclaiming a state of siege at Moscow: *N. Y. Times*, Oct. 20, 1941, p. 1.
- 21 GREAT BRITAIN—MEXICO. Resumed diplomatic relations, broken off in the spring of 1938. *N. Y. Times*, Oct. 22, 1941, p. 1.
- 21 PORTUGAL. Portuguese ships were prohibited from carrying any goods destined, directly or indirectly, to belligerent countries. *London Times*, Oct. 22, 1941, p. 3.
- 22 HUNGARY—RUMANIA. Announcement made of Rumania's denunciation of the Vienna pact regarding Transylvania [arbitration award of Aug. 30, 1940]. *N. Y. Times*, Oct. 23, 1941, p. 1.
- 25 GERMANY—NORWAY. Prize court sitting at Hamburg decided a "state of war still exists" between the two countries. *N. Y. Times*, Oct. 26, 1941, p. 6.
- 27 CANADA—UNITED STATES. Exchanged notes at Washington regarding temporary diversion of water for power purposes at Niagara Falls. Texts: *Cong. Record* (daily), Nov. 24, 1941, pp. 9282-9283.

- 27 CROATIA—ITALY. Signed treaty at Zagreb fixing the borders between Croatia and Montenegro. *N. Y. Times*, Oct. 28, 1941, p. 9.
- 27-November 5 INTERNATIONAL LABOR ORGANIZATION. 160 delegates from 33 nations met in New York. *N. Y. Times*, Oct. 28, 1941, p. 1. U. S. delegation: *D. S. B.*, Oct. 25, 1941, pp. 333-334. On Nov. 4 Czechoslovakia, Yugoslavia, Poland and Greece signed a pact for post-war economic unity. *N. Y. Times*, Nov. 5, 1941, p. 46.
- 30/November 4 SOVIET RUSSIA—UNITED STATES. Paraphrases of texts of letters from President Roosevelt and Joseph Stalin regarding a lease-lend credit to Russia of one billion dollars: *N. Y. Times*, Nov. 7, 1941, pp. 1, 13; *D. S. B.*, Nov. 8, 1941, pp. 365-366.
- 31 FRENCH RECOGNITION. Free French headquarters in London announced recognition of the constitution of the Free French National Committee had been granted by Belgian, Polish and Czechoslovak Governments. *London Times*, Nov. 1, 1941, p. 3.
- 31 GREECE—SOVIET RUSSIA. Greek Minister presented letters of credence at Kuibyshev, following severance of relations June 8 last. *N. Y. Times*, Nov. 3, 1941, p. 7.
- 31 JAPAN—SOVIET RUSSIA. Soviet Russian Government announced signature of a protocol fixing the frontier between Outer Mongolia and Manchukuo in the Lake Buirnor region. *N. Y. Times*, Nov. 3, 1941, p. 6.

November, 1941

- 1/8 GERMANY—UNITED STATES. German statement formally declared the United States attacked Germany in incidents involving the United States destroyers *Greer* and *Kearney*. *N. Y. Times*, Nov. 2, 1941, p. 1. Text of statement: p. 13. Hitler, on Nov. 8, ordered German navy to fire on United States ships only after being attacked. *N. Y. Times*, Nov. 9, 1941, p. 1.
- 2 NATIONAL INDIAN INSTITUTE. Established by Executive Order, to be affiliated with the Inter-American Indian Institute created by the Inter-American agreement of Nov. 29, 1940. *N. Y. Times*, Nov. 3, 1941, p. 3.
- 3-12 FINLAND—UNITED STATES. Secretary Hull stated the United States had asked Finland to end its war with Russia and to consider the Soviet peace offer of last August. *N. Y. Times*, Nov. 4, 1941, p. 1. On Nov. 7 the State Department published a memorandum on conversations with the Finnish Minister on the Russian offer. Text: *D. S. B.*, Nov. 8, 1941, pp. 362-363; *N. Y. Times*, Nov. 8, 1941, p. 4. Finnish note of Nov. 12 rejected United States warning. *N. Y. Times*, Nov. 12, 1941, p. 1. Excerpts: Nov. 13, 1941, p. 2.
- 6 JAPAN—PANAMA. Panama banned all Japanese commercial establishments. *N. Y. Times*, Nov. 7, 1941, p. 2.
- 7 CUBA—UNITED STATES. Signed lease-lend agreement at Washington. *N. Y. Times*, Nov. 8, 1941, p. 3.
- 7/13 UNITED STATES NEUTRALITY. Congress voted to amend the Neutrality Act of 1939 to permit arming of merchant ships and passage of United States ships and citizens through combat zones. *N. Y. Times*, Nov. 8 and 14, 1941, pp. 1 and 1. Text of Act, this JOURNAL, Supp., p. 56.
- 13 ARGENTINA—CUBA. Exchanged ratifications at Havana of the commercial treaty, signed Dec. 20, 1940. *N. Y. Times*, Nov. 14, 1941, p. 9. Text of treaty and proto-

col: *Revista Argentina de Derecho Internacional* (Buenos Aires), April/June, 1941, pp. 132-136.

- 14 JAPAN—PERU. Japanese Foreign Office announced that the Peruvian Government had agreed to pay an indemnity of 1,400,000 soles for damage caused in an anti-Japanese outbreak in Lima in May 1940. *N. Y. Times*, Nov. 15, 1941, p. 7.
- 14 SHIPPING. Inter-American Financial and Economic Advisory Committee recommended the formation of a special commission to draw up plans for the efficient use between the Americas, of all available merchant vessels, including foreign-flag ships tied up in American ports. Text of resolution: *D. S. B.*, Nov. 22, 1941, pp. 403-405.
- 14 TRAVEL REGULATIONS. President Roosevelt proclaimed regulations for persons entering and leaving the United States, including the Panama Canal Zone, Commonwealth of the Philippines, and all territory and waters continental or insular, subject to United States jurisdiction. Text of proclamation: *D. S. B.*, Nov. 15, 1941, pp. 381-383.

INTERNATIONAL CONVENTIONS

EUROPEAN COLONIES AND POSSESSIONS IN THE WESTERN HEMISPHERE. Havana, July 30, 1940.

Approval: Colombia. Aug. 30, 1941. *D. S. B.*, Oct. 4, 1941, p. 253.

Ratification (with reservations): Argentina. Aug. 22, 1941. *D. S. B.*, Oct. 18, 1941, p. 303.

Ratifications deposited:

El Salvador. July 9, 1941. *D. S. B.*, Oct. 25, 1941, p. 335.

Venezuela. Oct. 22, 1941. *D. S. B.*, Nov. 8, 1941, p. 373.

FUR SEALS. Washington, July 7, 1911.

Abrogation effective: Japan. Oct. 23, 1941. *N. Y. Times*, Oct. 25, 1941, p. 5.

Termination: Oct. 23, 1941. *D. S. B.*, Oct. 25, 1941, p. 336.

GENEVA CONVENTION. Aug. 22, 1864. Revisions, July 6, 1906.

Adhesion: Argentina. Apr. 14, 1941. *Revista Argentina de Derecho Internacional* (Buenos Aires), Apr./June, 1941, p. 130.

INTER-AMERICAN COFFEE MARKETING AGREEMENT. Protocol, Washington, April 15, 1941.

Signature: Venezuela. Aug. 14, 1941. *D. S. B.*, Sept. 27, 1941, p. 239.

INTER-AMERICAN INDIAN INSTITUTE. Mexico City, Nov. 29, 1940.

Adhesion: Paraguay. *D. S. B.*, Oct. 11, 1941, p. 285.

Ratification: Ecuador. Oct. 8, 1941. *D. S. B.*, Nov. 8, 1941, p. 373.

INTER-AMERICAN RADIO COMMUNICATIONS ARRANGEMENT. Havana, Dec. 13, 1937.

Ratification deposited: Dominican Republic. Nov. 5, 1941. *D. S. B.*, Nov. 22, 1941, p. 422.

LETTERS, ETC., OF DECLARED VALUE. Buenos Aires, May 23, 1939.

Adhesion: Slovakia. *D. S. B.*, Oct. 11, 1941, p. 287.

NORTH AMERICAN REGIONAL BROADCASTING. Havana, Dec. 13, 1937.

Ratification deposited: Dominican Republic. Nov. 5, 1941. *D. S. B.*, Nov. 8, 1941, p. 373.

PARCEL POST. Buenos Aires, May 23, 1939.

Adhesion: Slovakia. *D. S. B.*, Oct. 11, 1941, p. 287.

POSTAL CHECKS. Buenos Aires, May 23, 1939.

Adhesion: Slovakia. *D. S. B.*, Oct. 11, 1941, p. 287.

POSTAL SUBSCRIPTIONS TO NEWSPAPERS. Buenos Aires, May 23, 1939.

Adhesion: Slovakia. *D. S. B.*, Oct. 11, 1941, p. 287.

POWERS OF ATTORNEY. Protocol, Washington, Feb. 17, 1940.

Signature (ad referendum): United States. Oct. 3, 1941. *D. S. B.*, Oct. 11, 1941, p. 285.

Ratification: Venezuela. Nov. 3, 1941. *D. S. B.*, Nov. 22, 1941, p. 421.

PRISONERS OF WAR. Geneva, July 27, 1929.

Adhesion: Argentina. April 4, 1941. *Revista Argentina de Derecho Internacional* (Buenos Aires), Apr./June, 1941, p. 129.

RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Revision, Cairo, April 8, 1938.

Approval: Brazil. *D. S. B.*, Sept. 27, 1941, p. 240.

Ratification: Colombia. July 10, 1941. *D. S. B.*, Sept. 20, 1941, p. 227.

TELECOMMUNICATIONS CONVENTION. Madrid, Dec. 9, 1932.

Adhesion: Croatia. *D. S. B.*, Sept. 13, 1941, p. 215.

Ratification deposited: Portugal and colonies. July 3, 1941. *D. S. B.*, Sept. 13, 1941, p. 215.

WILDLIFE PRESERVATION IN THE WESTERN HEMISPHERE. Washington, Oct. 12, 1940.

Ratification: Venezuela. Nov. 3, 1941. *D. S. B.*, Nov. 22, 1941, p. 421.

DOROTHY R. DART

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

SULLIVAN *v.* STATE OF SAO PAULO *

SAME *v.* STATE OF RIO GRANDE DO SUL

(Appeal from the District Court of the United States for the Eastern District
of New York)

August 4, 1941

Actions to recover payment of principal and interest on bonds issued by defendants.

Courts will accept as conclusive Executive pronouncements on whatever might be considered a "political" as opposed to a "judicial" question; but the adjudication of present rights of property within a court's jurisdiction is a purely judicial function which no executive department of the government is constitutionally or practically equipped to discharge, except in so far as such rights depend on the settlement of "political" questions.

When the Executive communicates to the court its acceptance of a foreign government's claim to immunity from suit, the court will accept the recitals of fact made by the representative of the foreign government, but must inquire whether the conclusion of immunity drawn by the Executive from these facts is of the kind which the court should and must accept as final.

In this case the Ambassador's note admitted that the funds belong to the defendant states and the Brazilian Federal Government's interest therein was predicated upon a plan for the conservation of foreign exchange which might be extended to a claim of interest in any foreign exchange assets possessed by any Brazilian citizen and thus render all Brazilian citizens as well as states completely immune to suit except in Brazilian courts. Decision cannot be founded upon such a radical extension of sovereign immunity.

The Brazilian Ambassador has presented facts, accepted by the State Department as true, which establish that the Brazilian states occupy in the Brazilian Union a status comparable to that of our own states in the American Union. It is well settled that the latter are immune from suit on general principles of international law in cases not covered by the 11th Amendment. It seems clear that the law should accord the immunity which we claim for our own states to foreign states whose constitutional position is the same. We therefore affirm the dismissal of the complaints and the vacation of the attachments.

CLARK, Circuit Judge.

Defendants are constituent states of the United States of Brazil. These actions against them, in respect of principal and interest alleged to be due on certain of defendants' bonds, were begun in the New York Supreme Court by attachment of New York bank accounts of defendants and service by publication. After both actions had been removed to the federal court, defendants appeared specially to move dismissal of the actions and vacation of the attachments on the ground of their sovereign immunity to suit.

While these motions were pending, the United States Attorney for the Eastern District of New York submitted to the court on the request of the Secretary of State a note from the Brazilian Ambassador asserting defendants' immunity to suit, and asserting further that the interest in the funds of the federal government of Brazil was such as to render them immune to attachment. Attached to the note were copies of certain Brazilian decrees, by which the Brazilian federal government's interest was allegedly estab-

* 122 Federal Reporter (Second Series), 355.

lished. The communication from the United States Attorney expressly disavowed any intention to appear in the suit on behalf of Brazil, the defendants, or the United States, and nowhere vouched for the validity of the claims.

Shortly thereafter the court addressed to the Secretary of State a letter asking whether the State Department had "recognized and allowed" the claims of immunity within the meaning of those words as used in *Compañía Española v. The Navemar*, 303 U. S. 68, 74, 58 S. Ct. 432, 82 L. Ed. 667. In answer to this it was informed that the

"Department . . . had no doubt as to the accuracy of the statements" in the Brazilian Ambassador's note "as to the status of the Brazilian States" and likewise as to "the ownership and disposition of the funds in question," but that "it is the practice of the Department to leave such questions [of granting or withholding immunity] for determination by the courts, applying the principles of international law to the facts and circumstances of the particular cases."¹

In a second letter the court pressed for a categorical answer to the question whether or not the claims had been "recognized and allowed," and received an answer in the following terms:

The Department's earlier statements on this subject were not intended to indicate that it had "recognized and allowed" the claim of immunity as a conclusion of law, but rather were intended, as indicated, to show that the Department felt that a *prima facie* case had been made out by the Government of Brazil, which justified the Department in having the statements presented to the court for its consideration. The Department's action necessarily implied an acceptance, as true, of the statements of fact made by the Brazilian Government. It was felt, however, that the ultimate decision of the question of immunity, in view of the political status of the States of Rio Grande do Sul and Sao Paulo, and of the relationship of the Brazilian Government to the funds in question, should be left to the court. The action taken by the Department in these cases was similar to that taken in other cases where the Department felt that there was merit to the contention of the foreign government but did not undertake to pass upon such contention as a conclusion of law. I may state, however, that, aside from the question of the political status of the two defendant States, it is the view of the Department that the interest of the Government of Brazil in the funds, as explained in the Brazilian Ambassador's note of July 11, 1940, is of such character as to entitle them to immunity from attachment by private litigants.

On the basis of these representations, and without any hearing on either the nature of Brazil's interest in the funds or the status of the defendants, the complaints were dismissed and the attachments vacated.

The parties are in serious dispute as to the significance to be attributed to

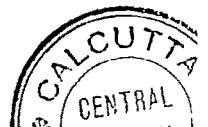
¹ This letter and the later letter are both quoted in full in the report of the opinion below. D.C.E.D.N.Y., 36 F. Supp. 503, at pages 504, 505.

the actions of the State Department and the District Attorney. Were these officials acting merely as the automatic conduit of the Brazilian Ambassador's claim, or did they also place upon it the stamp of indorsement of the Department? Evidently some favorable implication must be drawn, for sometimes the Department has declined to act at all, as in *Compañía Española v. The Navemar*, *supra*, and *Molina v. Comision Reguladora*, 91 N.J.L. 382, 103 A. 397, and has even positively expressed itself as opposed to a claim of immunity. *The Pesaro*, D.C.S.D.N.Y., 277 F. 473. It is said that in only two instances, one involving the arrest of a foreign warship, *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 11 U. S. 116, 3 L. Ed. 287, and the other a suit directly against a foreign sovereign, *Hassard v. United States of Mexico*, 173 N. Y. 645, 66 N. E. 1110, has the Executive ever actually appeared in a suit to move dismissal on these grounds. Deák, *The Plea of Sovereign Immunity*, 40 Col. L. Rev. 453, 461. Whether or not it does so is not necessarily a test of its attitude toward the validity of a claim, or its "recognition and allowance" thereof within the sense of *Compañía Española v. The Navemar*, *supra*. Cf. *The Attualita*, 4 Cir., 238 F. 909; *Puente v. Spanish National State*, 2 Cir., 116 F. 2d 43.

That test should naturally be supplied by the Executive's representations, not the technical nature of its appearance. Here the Executive chose to transmit the claim, which act alone has been held to be an implied recognition. *Miller v. Ferrocarril del Pacifico de Nicaragua, Me.*, 18 A. 2d 688. *Contra: Lamont v. Travelers Ins. Co.*, 281 N. Y. 362, 24 N. E. 2d 81; *Hannes v. Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189, 20 N. Y. S. 2d 825. And when pressed, it did much more. It not only vouched for the accuracy of the statements of fact made by the Brazilian Ambassador, but also declared it to be "the view of the Department that the interest of the Government of Brazil in the funds, as explained in the Brazilian Ambassador's note of July 11, 1940, is of such character as to entitle them to immunity from attachment by private litigants." This appears to be a clear recognition of the claim of the Brazilian federal government so far as the Department is concerned, and the latter's refusal to recognize it "as a conclusion of law" can hardly be more than modest concern not to usurp the constitutional function of the courts.

We have no hesitation, therefore, in accepting these communications as the official representation of Executive acceptance of the Ambassador's claims. And therefore we accept for the purposes of decision herein the recitals of fact made by the Ambassador. Compare *Banco de España v. Federal Reserve Bank*, 2 Cir., 114 F. 2d 438, 443. Next we must inquire whether the conclusion of immunity drawn by the Department from these facts is of the kind which the courts should and must accept as final.

Courts will undoubtedly accept as conclusive Executive pronouncements on whatever might be considered a "political," as opposed to a "judicial," question, *Doe ex dem. Clark v. Braden*, 16 How. 635, 57 U. S. 635, 14 L. Ed.



1090, including the question whether one is a sovereign, *Oetjen v. Central Leather Co.*, 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726; *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797, and the question whether one is a sovereign's privileged diplomatic representative. *United States v. Ortega*, C.C.E.D. Pa., Fed. Cas. No. 15,971; *Engelke v. Musmann*, [1928] A. C. 433; see *Ex parte Baiz*, 135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222. Such questions as these must have been within the contemplation of the court in the *Navemar* case, when it said (303 U. S. page 74, 58 S. Ct. page 434, 82 L. Ed. 687): "If the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction." See Deák, *supra*, 40 Col. L. Rev. at page 462. For Executive action in respect to such questions, if not actually determinative of them, is at least the best evidence which it is possible to adduce. *United States v. Liddle*, C.C.E.D. Pa., Fed. Cas. No. 15,598.

The adjudication of present rights to property within a court's jurisdiction is, however, a purely judicial function, which no Executive department of the government is constitutionally or practically equipped to discharge. *Banco de España v. Federal Reserve Bank*, *supra*. Every court has the general power to pass on questions affecting its own jurisdiction, *Stoll v. Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104; and where that jurisdiction is *in rem* or *quasi in rem*, as based upon property in its control, no Executive action can deprive the court of jurisdiction—or even constitute evidence of rights in the property—except in so far as such rights depend on the settlement of "political" questions, as on issues of sovereignty of a party or his assignor. *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 56 S. Ct. 343, 80 L. Ed. 331; *Berizzi Bros. Co. v. S. S. Pesaro*, 271 U. S. 562, 46 S. Ct. 611, 70 L. Ed. 1088.² See *United States v. Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134.

So far, therefore, as decision turns upon the immunity of defendants' New York funds to attachment by reason of Brazil's alleged interest, it must rest upon what the court finds to be Brazil's actual interest. The Ambassador's note admitted that the funds belonged to the defendant states, in whose names they stood. His claim of a federal "interest" therein was predicated on the so-called "Arunha Plan" for the partial disposal to the states of available foreign exchange with which to meet their defaulted foreign obligations. The promulgation of this plan, February 5, 1934, followed an earlier

² Immunity from arrest was extended to a ship owned and possessed by the Italian Government, but operated in the carriage of merchandise for hire, although the State Department had expressed to the district court, during the course of the proceedings, its "view" that such vessels should not be entitled to immunity. See *The Pesaro*, *supra*, 277 F. at page 479. The Supreme Court decided the question without reference to the State Department.

prohibition on the sale of foreign exchange except as authorized by decree or by a named committee. Neither the prohibition nor the plan requisitioned existing or future foreign exchange assets. On the contrary, the plan provided that the obligations so met were to remain the obligations of the respective states, to which foreign exchange would be supplied by the Bank of Brazil under stated quota provisions. Nowhere does the interest of the federal government appear to be anything more than the interest of a government in the conservation of a rationed commodity. Indeed, the federal government of Brazil might as rightfully claim an interest in any foreign exchange assets possessed by any Brazilian citizen, regardless of where held, as it does to the funds here in issue, and render all Brazilian citizens, as well as Brazilian states, completely immune to suit except in Brazilian courts. So, incidentally, might Germany and Italy, which have comparable systems for the rationing of available foreign exchange.

This, therefore, is a claim for a rather radical extension of sovereign immunity, one for which direct precedent appears to be lacking. In *The Attualita*, *supra*, the vessel sought to be released had been "requisitioned" by the Italian Government, and was admittedly being used in its service. Nevertheless, immunity was denied because the vessel had not actually been confiscated or removed from the possession of its private owner. See, also, *Ex parte Muir*, 254 U. S. 522, 41 S. Ct. 185, 65 L. Ed. 383. We are not content to rest decision upon this claim.

We believe, however, that the defendant states should be accorded sovereign immunity in their own right. The representation of the Brazilian Ambassador to the State Department has presented facts, accepted by the latter as true, which establish that the Brazilian states occupy in the Brazilian union a status comparable to that of our own states in the American union. It is well settled that the latter are immune from suit on general principles of international law in cases not covered by the Eleventh Amendment. *Monaco v. Mississippi*, 292 U. S. 313, 54 S. Ct. 745, 78 L. Ed. 1282. That they have sacrificed control over foreign affairs does not deprive them of this status, *Duff Development Co. v. Kelantan Government*, *supra*; nor does the failure of our own government to maintain diplomatic relations with them. *In re Patterson-MacDonald Shipbldg. Co.*, 9 Cir., 293 F. 192, *certiorari* denied 264 U. S. 582, 44 S. Ct. 331, 68 L. Ed. 860; *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 138 N. E. 24.

As was said in *Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 27 S. Ct. 526, 527, 51 L. Ed. 834, which recognized the immunity to suit of the territory of Hawaii, although the territory derived all its powers by delegation from the United States Congress: ". . . the doctrine [of sovereign immunity] is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from

which persons within the jurisdiction derive their rights." See, also, *Smith v. Weguelin*, L. R. 8 Eq. 192, 212-214, 1869.

In the sense so defined, the defendant states are admittedly sovereign, and should therefore possess the immunity which is conceded to a friendly foreign sovereign. *Puente v. Spanish National State*, *supra*. Several continental authorities supporting suability of a constituent state of a federation have been pressed upon us, but the general law appears unsettled, Harvard Research in Int. Law, Competency of Courts in Regard to Foreign States, 1932, 479-488, with England recognizing immunity under comparable conditions. *Duff Development Co. v. Kelantan Government*, *supra*, [1924] A. C. at page 814; *Smith v. Weguelin*, *supra*, L. R. 8 Eq. at pages 198, 212-214. Compare *State of Yucatan v. Argumedo*, 92 Misc. 547, 157 N.Y.S. 219. It seems clear to us that the law should accord the immunity which we claim for our own states (*Monaco v. Mississippi*, *supra*) to foreign states whose constitutional position is the same; and therefore we affirm the dismissal of the complaints and the vacation of the attachments.

Since the above opinion has failed to win the approval of my brother who desires to rest on another theory, perhaps I should say a word about the latter in view of its importance. Suability of foreign governments is indeed a delicate issue where the Department of State refrains from making the question a political one—whether from design or by masking its real views in the polite language of diplomacy. Angell, *Sovereign Immunity—The Modern Trend*, 35 Yale L. J. 150, 168. Recent vigorous comment accuses our courts of going beyond those of other nations in denying remedies against defaulting countries on worthy claims of our own citizens. 50 Yale L. J. 1088; *cf.* Brinton, *Suits against Foreign States*, 25 Am. J. Int. L. 50. But the theory here announced seems to me a step beyond any immunity yet granted, for it immunizes property in this country from attachment for a debt due here merely on the assertion of a foreign sovereign, not of title or a recognized property interest, but of a plan for rationing foreign exchange. No claim of federal ownership of the funds is even asserted; and the State Department vouches only for the facts of the plan, for such effect as our courts may think they have, while it carefully refrains from suggesting any political connotations or denotations from such judicial adjudication. This leaves it purely a local property, not a political, issue, of the kind we have said the courts must adjudicate. *Banco de España v. Federal Reserve Bank*, *supra*, 114 F. 2d at page 442. And the *rationale* commits us to recognize such a scheme as applied as well to the property of private citizens of the foreign government, once the latter makes general claim to an interest in rationing the payment of their debts; our State Department can hardly refrain from vouching for the existence of the scheme (when it does exist) without being manifestly unfriendly. Such an invitation to foreign governments to immunize and sequester funds of their nationals in this country I do not believe they will be slow in accepting.

On the other hand, immunity of public states when, and only when, they

are like our own states, as vouched for by the State Department, seems to me not only natural and limited and reasonable, but also a privilege we would find ourselves hard put to find reasons to deny without unfriendly implications in our denial. For we assert such immunity for our states, *Monaco v. Mississippi*, *supra*, and for the territory of Hawaii, *Kawananakoa v. Polyblank*, *supra*; and the doctrine seems already recognized, not only by the English cases cited *supra*, but by our own courts as to Australia, *In re Patterson-MacDonald Shipbldg. Co.*, *supra*, and political subdivisions of Portugal, *De Simone v. Transportes Maritimos do Estado*, 199 App. Div. 602, 191 N.Y.S. 864, and in according the right to sue to Yucatan, *State of Yucatan v. Argumedo*, *supra*—though not immunity to a Yucatan hemp corporation. *Molina v. Comision Reguladora del Mercado de Henequen*, 91 N.J.L. 382, 103 A. 397. The privilege thus would not be open to all foreign political subdivisions, only to those of the kind for which our law itself demands immunity. Compare 26 Corn. L. Q. 727, 729.

Affirmed.

L. HAND, Circuit Judge (concurring).

The facts on which the jurisdiction of the district court can rest are undoubted; it had a *res* within its control, and the statute gave it substantive jurisdiction over the controversy. When I say it had a *res* within its control, I mean that it could direct the obligor to pay the deposit to the plaintiff, and that its order would be recognized everywhere as a valid discharge. Again, it had substantive jurisdiction over the controversy, because it had unquestioned power to decide the case; for example, if the defendant had appeared. There was therefore no lack of jurisdiction, but there was a grave question whether the court should exercise it. When a court seizes property from the actual possession of a foreign state with which we are in amity and that state intervenes in due form to assert a claim to it, the court will desist even though our Department of State does nothing. *The Pesaro*, 255 U. S. 216, 41 S. Ct. 308, 65 L. Ed. 592; *Ex parte Muir*, 254 U. S. 522, 41 S. Ct. 185, 65 L. Ed. 383; *The Pesaro*, 271 U. S. 562, 46 S. Ct. 611, 70 L. Ed. 1088; *The Navemar*, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667; *The Carlo Poma*, 2 Cir., 259 F. 369. When, however, the foreign state is not in possession of the property seized, it cannot secure a dismissal merely by showing that it has an interest in preventing the seizure. *The Navemar*, *supra*, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667; *The Attualita*, 4 Cir., 238 F. 909. I can think of no *rationale* which will reconcile these doctrines except that the violation of a foreign state's possession is so grave an indignity as *ipso facto* to embarrass the relations between that state and the state of the forum; it is better that the wrongs of the court's nationals should be left to negotiation between the Powers. Obviously that does not apply to all suits which in any degree affect the interests of a foreign state; those interests may be trivial, the foreign office of the state of the forum may prefer incurring the slight friction which the prosecution of the suit may arouse to depriving its

nationals of their normal redress and to settling the controversy by negotiation. The question is certainly not for the foreign state's sole decision; it must rest with the foreign office of the state of the forum.

In the case at bar it was necessary to the success of the plan of putting the national Brazilian credit upon a firm basis that the credit of the federate states should be included; our Department of State by vouching for the "statements of fact" in the ambassador's protest has made this datum. Moreover, it needs no argument to prove that the plan cannot succeed if Brazilian credits are open to attachment by our nationals. That alone would not have been enough; the district court had to have the added assurance of our Department of State that the suit would, or might, prejudice the relations between Brazil and ourselves; and, although the language was very guarded, I think its import went so far. The mere fact that the Department saw fit to transmit the protest at all was evidence that it regarded the issue as substantial; it might well, as in the case of *The Navemar*, *supra*, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667, have left the ambassador to intervene personally. The language chosen, especially in the letter of November 22, 1940, bears out this inference. Not only had the Department earlier vouched for the truth of the "statements of fact" in the protest, as I have said, but in that letter it declared that "a *prima facie* case had been made" for immunity, and that "the interest of the Government of Brazil . . . is of such a character as to entitle" the funds to "immunity." I cannot read this otherwise than that the Department thought the issue important enough for the district court not to proceed.

I prefer this ground for affirmance to holding without more that each of the federated states of Brazil is immune from suit. Possibly that is true, for those states do indeed have large governmental powers; but so have many cities, and I should hesitate to hold that every political division was immune which exercised substantial governmental powers. It does not seem to me desirable, or indeed practicable, in every case to examine the municipal law of a foreign state in order to see how far the functions of one of its political divisions justify giving it immunity; nor indeed do I know any measure by which to judge that issue. Certainly, if the answer depends upon how far the suit will affect foreign relations, only our foreign office ought to decide it. If that office does not think that the foreign state's protest deserves transmission to its own court, I would not go at all into the question of the "sovereignty" of the political division of the foreign state. I know of no decision to the contrary unless it be *In re Patterson-MacDonald Shipbuilding Co.*, 9 Cir., 293 F. 192, where before the Statute of Westminster the Commonwealth of Australia was a party to a bankruptcy proceeding; and there the court really begged the question by treating Australia as an independent state. All the other decisions cited in the majority opinion do not, I believe, touch the point. On the other hand, there are several decisions in French and Belgian courts which have entertained suits against the political divisions of a federation.

BOOK REVIEWS AND NOTES

The Law Relating to Trading with the Enemy. By Arno Blum and Max Rosenbaum, with collaboration of Herbert S. Baron. London: Solicitors' Law Stationery Society, 1940. pp. xx, 196. Index. 15s.

This treatise is based largely on the British Trading with the Enemy Act of 1939, with references to decided cases and other wartime acts and regulations. As decisions under this Act are few, references are made to decisions under the similar laws of the last World War where the wording is similar or identical. The headnote contains an extract from the famous decision of Lord Stowell in *The Hoop* (1799), 1 Roscoe 105, laying down the broad principle that intercourse with the enemy, except upon permission of the state, is prohibited. The text closely follows the Act, but under more convenient headings and arrangement, such as definitions, prohibitions, specific transactions, custodian of enemy property, control and penalties, enemy parties to civil proceedings.

In Part I there is a long discussion as to the persons or bodies of persons who are classed as "enemies" either by the Act or by common law. Generally speaking, they include any state or sovereign at war or any individual or body of individuals residing in or trading in enemy territory, or any person acting on behalf of these. A distinction is made between enemies and enemy subjects. Enemy territory is defined as the area which is under the sovereignty of or in the occupation of a Power at war with His Majesty. Enemy currency, enemy property and prohibited goods are also defined.

In Part II prohibitions are discussed in general and with reference to particular instances of illicit trading, such as supply of goods to and receipt of goods from an enemy, payments to or for the benefit of an enemy and performing any obligation to or on behalf of an enemy. Restrictions on specific transactions are covered in Part III, which treats of contracts with the enemy, transfers of negotiable instruments and choses in action, conversion, transfer and allotment of securities, patents, trade-marks and copyrights, and consignments from enemies. Contracts with the enemy are discussed according to the common law and the Trading with the Enemy Act. The Act prohibits, generally speaking, any commercial, financial or other intercourse or dealing with an enemy unless licensed or unless the intercourse consists only of the receipt of payment from an enemy for an obligation performed before the war. The issuance of patents and the like may be postponed, the publication may be prohibited or restricted, and the disclosure of information regarding them may be demanded. Pre-war patents and the like are not generally invalidated by the war, but may be vested in the Custodian and used. By Orders in Council, all goods of enemy origin and ownership which are carried on the high seas are declared

to be contraband and liable to seizure, with certain exceptions and under certain conditions, which are discussed.

Of considerable interest is the section on The Custodian of Enemy Property (Part IV), which reinstates a good many of the requirements of the last war. "At common law the Crown may, during the war, lay hands on and confiscate debts due and goods belonging to enemies." The Crown may still exercise these rights, but ordinarily it will resort to the machinery laid down by the Trading with the Enemy Act. "Its provisions . . . have been enacted for the purpose of preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace." Similar provisions were made during the last war. Consequently, the Act provides for the appointment of custodians by the Board of Trade, with powers, rights and duties to take over, handle, sell and retain all kinds of enemy property and to require the filing of returns as to the existence and kinds of such property. Any money which would, but for the existence of the war, be payable to or for the benefit of an enemy, must be paid to the custodian, and other property may be taken under control by means of vesting orders.

Besides restrictions on the purchase and export of foreign currency and securities, special measures of control may be adopted with a view to securing compliance with the prohibitions against trade with an enemy, such as inspection, supervision, control of businesses, search and arrest, and control over goods, to be undertaken by the Board of Trade (Part V). As to enemy parties to civil proceedings (Part VI), "at common law and under the Trading with the Enemy Act all the enemy's rights are either extinguished or suspended." Accordingly, an enemy, during the war, has no cause of action at all. But it seems that enemy subjects (as distinguished from an "enemy"), whether interned or not, are not debarred from suing, under decisions of the last war. On the other hand, an enemy can be sued as a defendant without restrictions if he can be served.

The Act repeals the Trading with the Enemy Act of 1914 and all amendments thereto, except a part of the Export Prohibition Act, 1916. The appendices contain the Trading with the Enemy Act, 1939, the Import and Export Customs Powers Act, 1939, The Patents, etc. Act, 1939, and certain Orders thereunder.

L. H. WOOLSEY

Le droit de la neutralité et le problème des crédits consentis par les neutres aux belligérants. By Jean-Flavien Lalive. Zurich: Éditions Polygraphiques, 1941, pp. 238. Index. Fr. 8.

The Swiss author of this monograph, who has studied in the United States, examines the question of the effect of new world conditions on the problem of granting credit or loans by neutrals to belligerents. He is of the opinion that the classical law of neutrality, as developed down through the Hague Conventions, was conditioned on certain economic and social facts

especially manifested during the 19th century, namely, a fundamental distinction between private property and trade, even in contraband, on the one hand, and public property and state activity, on the other; the prevalence of short and limited wars which the doctrine of neutrality did much to localize; a relatively free economy which permitted private loans but drew the line at state loans by neutral countries to belligerent countries. The author finds that while the War of 1914-1918 did not materially impair the fundamental purpose of neutrality—to enable countries to remain out of war—it did break down the economic privileges of trade and loans and created post-war conditions which imperceptibly led in varying degree to state intervention in private affairs until now state control of commerce and credit prevails in most of the world. This change in economic and social facts, he thinks, will produce a profound change in the rights and duties of neutrality, although he is not prepared conclusively to state what these changes will be. It is very questionable whether sales to dealers in countries which in 1915 rationed food (p. 166) made food absolute contraband.

As opposed to the uniformity of economic systems which facilitated a universal law of neutral rights and duties in the 19th century, he now finds great experimentation and divergence which are not conducive to a universal rule of law. Contrary to a belief expressed by several jurists that state control of commerce and credit places greater duties on the neutral state to abstain from participation in foreign wars and thus in greater degree to restrict both commerce and credit—a policy which for other reasons was supported by the United States neutrality laws of 1935-1939—Mr. Lalive thinks that neutral duties will change so as to permit the neutral state without discrimination between the belligerents to finance the export at least of foodstuffs and raw materials necessary to keep the neutral economy going, and that such commercial assistance will not be regarded as a breach of neutral duty. He finds support for this conclusion in the Havana Convention of 1928 and in the fact that Switzerland and Denmark during the European War of 1914 felt obliged to enter into commercial agreements with the respective belligerents. He pays tribute to the great services rendered by the United States to the cause of peace and neutrality before 1914 and entertains the belief that even after 1914—prior to the Lease-Lend Act—American policies might afford a guide to what the world is likely to do. He is, however, unduly impressed by the so-called Neutrality Acts of 1935-1939 and does not allow enough for the special circumstances which gave birth to those statutes. He is impressed by the fact that the Federal Reserve Board in 1915 was permitted to discount bills of exchange for munitions and is not sure whether this marks a new, privileged relaxation in neutral duties or the progressive unneutrality of the United States.

It is doubtless true that the rules of neutrality culminating in the Hague Conventions were conditioned upon a capitalistic system permitting a large degree of private enterprise, and that with the approach or advent of state

socialism the neutral state must assume ever greater responsibility for all internal activity, not merely public but "private" also. He thinks that the abuse of contraband and blockade in the War of 1914 may indicate a gradual obsolescence of these institutions. He considers the League campaign against neutrality as tending to produce the very opposite of Utopia.

Since private neutral loans to belligerent countries are now academic for a variety of reasons, his examination of this phenomenon has purely historical interest. The credit and loan prohibitions of several American Neutrality Acts from 1936 to 1939 became academic not only by the economic facts but by the substitution of government credit for private. But government credit for military purposes, as Lalive points out, is an act of war and, like the amorphous status of non-belligerency, is a step on the road to war. While neutrals have not been primarily motivated by a desire to profit from foreign wars, as the author assumes in reliance on an aphorism of Jefferson, they have been anxious to preserve themselves notwithstanding the holocaust. The author, therefore, seeks a new criterion for permitting neutral states to retain that status even under state socialism; hence his willingness to allow the governmental facilitation of non-military commerce even in time of war.

The study is very creditable and should be taken into account when the post-war world is planned.

EDWIN BORCHARD

International Legislation. Edited by Manley O. Hudson. Vol. VII: 1935-1937. Washington: Carnegie Endowment for International Peace, 1941. pp. xlx, 1026. Index. \$4.00.

Judge Hudson, the indefatigable fighter for both international law and documentation for the science of international law, gives us the seventh volume of his work, *International Legislation*. It contains 140 numbers and 104 principal instruments, covering the years 1935 to 1937. In harmony with the whole work, only multipartite international instruments of general interest, whatever their name, are included.

The subjects with which these instruments deal are to a great extent non-political in nature: communications, radio, transit, labor, cultural relations. But the volume contains also highly important documents of far-reaching legal and political significance: Roehrich Pact 1935, Statute and Fundamental Law of the Sandjak of Alexandrette, the Montreux Convention 1936 on the régime of the Straits, London Naval Treaty 1936, and London procès-verbal 1936 concerning rules of submarine warfare, the treaties of the Buenos Aires Conference 1936, the new Rules of the Permanent Court 1936, Anti-Comintern Pact 1937, Nyon-Arrangements 1937, the Montreux Convention of 1937 concerning the abolition of capitulations in Egypt, the so-called "Saadab-Pact" of 1937. Many of the instruments given are regional in character. A few documents are given only in English or only in French; a great number are printed in English and French, the Inter-American Treaties in English and Spanish.

While many of the instruments are taken from the *League of Nations Official Journal*, many others have been taken from such varied sources as the United States Treaty Series, British Parliamentary Papers, Pan American Conferences, Pan American Union or official publications of single states. Of the 104 principal instruments, 80 are reported to have entered into force. Whether instruments which have not come into force should be included is debatable; this writer is in favor of such inclusion, not only because such instruments may yet come into force, but also because they are often historically interesting. But, of course, it must always be borne in mind that instruments which have not come into force are not law, but mere drafts. Such warning is particularly necessary today when some writers quote such documents, or even merely private proposals, *de lege ferenda* as positive law.

Manley O. Hudson's philosophy in editing this work is not only to make such texts conveniently available, but to open the eyes of those, who, just as they neglect statutory legislation in the common-law fields in favor of court decisions, neglect the immense treaty legislation in favor of customary international law. The work shows that, especially in the non-political field, there is, notwithstanding the present troubled political status of the world, an immense and growing need of international legislation. The work, thus, also disproves the pessimistic but superficial statements of many that "there is no such thing as international law."

Hudson has done more than to collect and edit these instruments. Very considerable work has been put into the important data of ratifications which are often very difficult of access. Of particular importance is the Editor's note, preceding each document, giving the history, prior and parallel efforts, as well as the valuable bibliography to each instrument. It is hardly necessary to say that the indices are very full and highly elaborate.

Hudson's work, very valuable in itself, has today an enhanced value. For the important *League of Nations Treaty Series* has, at least for the time being, come to an end; Marten's *Nouveau Recueil Général des Traités* is greatly slowed down. With the situation in Europe being what it is, such work can today be successfully carried out only in the United States of America.

JOSEF L. KUNZ

The International Labour Code, 1939. A systematic arrangement of the conventions and recommendations adopted by the International Labour Conference 1919-1939, with appendices embodying other standards of social policy. Framed by the International Labour Organisation 1919-1939. Montreal: International Labour Office, 1941. pp. xvi, 920. Indices.

The cessation of treaty-making by the I. L. O. at the moment—let us hope it may not be for too many years—has afforded the opportunity for issuing this volume at this time. Twenty years of activity on the part of the Inter-

national Labor Organization as a treaty-making body were abruptly halted in 1939 with the second outbreak of world war. Conventions, recommendations, resolutions and model regulations of increasing complexity, completeness and prolixity had flowed forth in an ever enlarging volume. Suddenly the stream congealed, and like some vast glacial deposit lay before the investigators for examination and inventory. What the International Labor Office from its temporary headquarters in Montreal, Canada, has now done in this analysis is to expose this stream of social legislation in its elements and analyze its turbid contents, thus held in momentarily frozen suspension.

The 920 large, richly white, quarto pages, fine print, neat and well spaced (except the introductory chapter), and flexible binding, are made up as follows: (1) text of the labor code in 550 pages; (2) the appendices comprising over 340 pages; (3) the index, 15 pages; and (4) the introductory "Note" another 15 pages. The volume brings together in classified form all the conventions adopted by the Conference since its inception. Introductory and concluding protocol clauses are omitted, and related material from different conventions is gathered under appropriate heads.

The arrangement of the volume is important since the work is primarily one of reference. An obviously elliptical table of contents is found between the foreword and the preface, but is followed farther on after the explanatory note by two most useful analytical tables of contents; the first showing in detail the book, chapter, and section headings of the Labor Code proper; the second giving the important subheadings of the appendices. There is a chronological list of conventions and recommendations, a table of abbreviations, and at the end a complex of four indexes: (1) Index of Interpretations and Judicial and Quasi-Judicial Decisions; (2) Index of International Labour Conference Resolutions; (3) Index of Principal Comparative Notes; and (4) Index of Principal Bibliographical Notes.

The volume is much more than a codification; it is a documentation of the interpenetration of the I. L. O. in regional and national social progress. The contents of the appendices is striking revelation of that fact. Here are found recorded the resolutions containing various standards of social and economic policy of the Conference and its committees; reports embodying conclusions of Conference committees or official international committees or commissions, respecting social policies, either in the form of reproductions or excerpts or footnote references to them; special "Asiatic" and "American" regional supplements, the former having reference to modifications (exemptions) of the conventions applicable in that lower standard area; the latter containing selected resolutions of the two Western Hemisphere conferences at Santiago, Chile, and Havana, Cuba; special labor clauses which have been incorporated either by direct International Labor Office initiative or through its pervasive influence in diplomatic instruments under the auspices of the League of Nations; and a list of extra I. L. O. agreements regarding labor questions. For full measure there has been added a statement of the histori-

cal record of international labor legislation as it stood in 1914 as a result of the Berlin Conference of 1890 and the two Bern Conferences of 1906 and 1913. And ground work for the future is laid in the inclusion of the texts of proposed conventions respecting the reduction of hours of work and a list of pending questions before the Organization, consideration of which was postponed by the last Conference in the summer of 1939—so fearlessly and hopefully did the I. L. O. work up to the outbreak of war in September of that year.

For both the student of the International Labor Organization and the practitioner in social action, with his need for convenient sources and compilations, the core of the volume is the explanatory introduction. With legalistic attenuation and super-precision this introduction is called a "Note," whereas it is more in the nature of a solid chapter that explains not only the method followed in making the codification in hand, but also, though somewhat by implication, the nature of the novel international system created by the I. L. O. For it was a novel system that combined in a wholly new pattern of relationships the principles of municipal and national legislation and international treaties.

The I. L. O. built up a system of cosmopolitan social legislation that reached across nations and bound together the social classes which made up the world-industrial society that grew out of the technological revolution. It also worked out the crude beginning—somewhat too optimistically dealt with in the explanatory note, this reviewer believes—of a system of enforcement of policies laid down in the I. L. O. treaties. The treaty-making functions and the administrative activities of the I. L. O. are thus both clearly and succinctly explained in the "Note."

The complexities of the problems of the I. L. O. are here by implication—between the lines and in the formidable array of chapters, sections, sub-heads, classified indexes, foreword, preface, notes and welter of topical entries. This complexity, on the other hand, has a certain suggestiveness for the reform of the I. L. O. if, as and when it gets under way again as a going concern.

Why should there not be done away with the present legalistic distinction between "conventions" and "recommendations"? It grew out of little-American prejudices of some of the American negotiators in the International Labor Commission of the Versailles Conference. It will be remembered that the "recommendation" was just a political devise for getting American coöperation in the I. L. O. It meant that the United States could avoid the responsibility for ratifying treaties which dealt largely with the making of labor laws believed to come exclusively within the competence of the States. But, now since American social legislation is for a large part national in scope, the recommendation no longer has any peculiar value for purposes of inviting American ratification of I. L. O. conventions. Except as a useful means for the I. L. O. in distinguishing between basic action having certain

technical and legal validity of a higher and more binding character represented by the convention, and minor action of a more limited and advisory character, the recommendation might well be done away with.

Another observation is prompted by this super-classified collection of I. L. O. instrumentalities of international social actions. It is that the I. L. O., upon its return to life from its present retirement into the convents and cubicles of research, should simplify its treaties and the procedures involved in their preparation. The history of the slow and sesquipedalian process of securing even limited ratification of the 8-hour treaty suggests a less involved and detailed instrument to be submitted for anything approaching universal consent.

A summation of twenty years of work, made possible and appropriate by the near-cessation of its work, suggests that a reconstituted I. L. O. should be made more of an integral part of any inclusive or regional world organization that may follow this war. The I. L. O. tried to keep its identity apart from the League, hoping it might thus attract certain nations who continued to hold aloof, or thinking it might survive a possible holocaust, while the League might conceivably go under alone. Both League and I. L. O. got the same answer to their endeavors. Next time let them try their fortunes together in health or in sickness, in politics or in economics.

LEIFUR MAGNUSSON

Curso de Derecho Internacional Privado. By José Matos. Guatemala, C. A.: Tipografia Nacional, 1941. pp. 697. Index.

Students and practitioners acquainted with this valuable treatise on private international law, first published in 1922, will welcome the present enlarged second edition. The expansion of the book from 567 to 697 pages is principally due to the growth of Guatemalan statutory law, and to the inclusion, in the appropriate chapters, of the text of the Bustamante Code and commentaries thereon. Dr. Matos has long been recognized in Latin American circles as one of the most eminent authorities in the field, and brings to his work not only the scholarship of the professor, but the experience and sound judgment of an active practitioner of the law. Beale's bibliography rightly called the first edition "a scholarly work of broad scope."

The scope of private international law as envisaged by civil law writers is wider than that of our topic of Conflict of Laws. For instance, of the seven titles into which the book is divided, one of the largest deals with the legal status of aliens, including nationality. Attention is also given to extradition, the right of asylum, international claims and diplomatic protection and other topics. Otherwise, the matters treated are in general those of our topic.

Dr. Matos adopts Bustamante's definition of private international law as "the body of principles which determine the limits in space of the legisla-

tive jurisdiction of States when applicable to legal relations which may be subject to more than one law." His analysis of the different historical and present-day theories is one of the noteworthy features of the book. He stresses that among civilized nations there exists (or at least should exist) a legal community, an international society, which tends to favor a general agreement as to private international law. Judges, in determining the applicable law, should pay heed to this international society, and it is a *duty*, not a mere matter of comity or tacit consent, to apply foreign law, when called for, subject only to the sovereignty of their own state as to matters of public policy. And as to public policy, he analyzes the distinction, too often neglected, between national public policy and an international public policy.

Comparative law plays a major rôle in this volume, which proves helpful for a quick glance at the law of many countries. As a guide to Guatemalan law, it is of special value to the practitioner. Other features, not readily found elsewhere, are a resumé of the law as to aliens during the Spanish colonial era in America and a valuable discussion of the conflict among Latin American countries between the principles of domicile and nationality—a conflict, since reconciliation was found impossible, left in abeyance by a compromise in the Bustamante Code. This compromise has been severely criticized, but Dr. Matos comes to its defence. PHANOR J. EDER

Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean. By Gordon Ireland. Cambridge: Harvard University Press, 1941. pp. xiv, 432. Index. Pocket map. \$4.50.

Unless the islands of the Caribbean are to be deemed extrinsic to North and Central America, the title to this book is, in a geographical sense, tautological. In his preface the author announces the effort "to limit the work strictly to boundary and possession problems." These, in so far as they pertain to the regions within the scope of his study, have been dealt with at some length and with obvious care. For the most part, there is a terse but useful portrayal of boundary problems and solutions arising from conflicts in Central America as well as in those also of North America. The author has, however, seen fit to go beyond these limits and to discuss certain political activities of the United States pertaining to, or growing out of, events in foreign territory in which it was interested. In so doing he has at times failed to make adequate portrayal. Such is the case, for example, in his treatment of the action of the United States in Nicaragua in 1927. (p. 11.) The statement (p. 56) concerning the intervention of the United States in Haiti in 1915, omits too much. In discussing the boundary dispute between Costa Rica and Panama, the author has omitted comment on the important note of April 27, 1921, in which Secretary Hughes vigorously asserted the right of his country to demand deference by Panama for the Loubet award and the White award. In considering the initiation of the

Spanish-American War and the results of it, it was not deemed necessary to discuss or even quote President McKinley's special message of April 11, 1898, which, however, was cited in a footnote (p. 326). In the discussion of boundary and kindred problems of Anglo-American aspect, the author did not advert to that famous report "respecting the Eastern boundary" by John Jay of April 21, 1785, in which he proposed a special method for the amicable adjustment of all disputes with the British Crown. (See Am. State Pap. For. Rel., I, 94.) Problems growing out of the diversion of waters, notwithstanding a reference to the treaty of January 11, 1909, and data in a footnote (p. 273), are left without discussion. Nor was the North Atlantic Coast Fisheries Arbitration, notwithstanding the character of the claim of the United States, deemed to fall within the purview of the work.

The author is of course entitled to great latitude of judgment in what he omits; and his gentle readers may be so well satisfied with the value and sufficiency of his offering, that they brand no omission as really sinful. His ungente readers (and it is to be hoped that they are few) may, however, be inclined to feel otherwise. The Department of State may evince amusement to find one of its former officers—Mr. Francis White—described as a "subsecretary," and it may regret the implied imputation to Malloy of the third and fourth volumes of the treaties of the United States. Notwithstanding the last sentence of the book (p. 416), no instance has been seen where the United States has by agreement "for public health, immigration, customs, and other federal purposes" sought to extend territorial limits on the marginal sea beyond three nautical miles. Still, Dr. Ireland has turned out a useful book which ought to be of great service in many quarters. Probably no one is profiting from it more than this reviewer.

CHARLES CHENEY HYDE

The Dutch East Indies: Its Government, Problems, and Politics. By Amry Vandenbosch. Berkeley and Los Angeles: University of California Press, 1941. pp. xii, 446. Bibliography. Index. \$4.00.

Since its original publication in 1933, Amry Vandenbosch's *The Dutch East Indies* has been the standard work in English on the Netherlands' great empire in the Orient. The second edition has been thoroughly revised and brought up to date. In the main, the revision has been accomplished by the interpellation of new paragraphs either at the end, or at appropriate places in the body of each of the chapters of the original work. There has also been a rearrangement of the chapter order, and a new chapter, "The Dutch East Indies and Japan," has been added. The statistical data have been carried down through 1939 by new figures in the text, in occasional tables in the body of the book, and in additional appendices.

Dr. Vandenbosch's work is so well known to persons interested in Netherlands India that no general description of the new edition need be given. So well balanced was the original volume that after nearly a decade there

were no serious *lacunae* to be filled in. Even the additional chapter upon the timely subject of the Japanese and the Indies is merely an expansion of the treatment formerly given in another place. In this chapter the author carefully and dispassionately traces the developments in Dutch Indies-Japanese relations through the middle of 1940. This discussion brings out clearly the fact that because the status of the Netherlands' empire in the East is of vital importance to every nation dependent upon its products or having important interests in the Orient, the Dutch would not stand alone in defending it. The conclusion reached is that an attack on the East Indies would involve greater risks than the Japanese Government would dare to undertake. The author observes, however, that, "Should the Allies lose the war in Europe the whole question would take on a new aspect."

In view of the probability that at the conclusion of the present world conflict there will be a general readjustment of international relationships and in some cases national institutions in the Far East, Dr. Vandenbosch has performed an especially valuable service in bringing down to the present the story of one of the most important of Oriental regions. In his discussions of the institutions which the Dutch are establishing among their Indonesian fellow subjects one finds revealed a steady progress towards the erection of a Dutch-Indonesian polity that may be expected to have great powers of endurance, even in a troubled world. Therein, perhaps, lies at least a partial explanation of the firmness with which the Oriental empire of the Netherlands Government-in-exile has stood during the storms of the past two years.

J. R. HAYDEN

The American Impact on Great Britain, 1898-1914. By Richard Heathcote Heindel. Philadelphia: University of Pennsylvania Press; London: Humphrey Milford, 1940. pp. xii, 439. Index. \$4.00.

This book is one volume of a series planned to examine the influence of this country in world history. The author evaluates the impact of the United States on Great Britain during that highly significant period, rich in material, incident, and tendency, from the Spanish-American War to World War I. While the study started in an effort to discover British reaction to American imperialism, its scope was extended to include an examination of British opinions concerning us and changes wrought in British life through American example in the fields of journalism, politics, education, literature, and social customs. There are three chapters evaluating the American impact on British thinking and policy in international affairs. While there is abundant grist for the propagandist mill, the author does not become a propagandist. Although it would have been easy to have made this study a brief for union now with Great Britain, the author tries impartially and scholarly to understand rather than to advocate.

One feels that the importance of this book to a student of international relations lies not in the disclosure of new diplomatic materials or in revolu-

tionary interpretation, but in thorough research and sound judgment applied to a phase of diplomatic relations not sufficiently explored. The copious footnotes conveniently placed at the end of each chapter provide full documentation to English, American, and continental primary and secondary materials with an especially complete reference to English opinion as expressed in periodicals. In addition, the author makes interesting use of materials obtained in a year of field work spent in "sampling" the opinion of ten thousand Britons, including eight hundred selected interviews.

Two dominant and complementary tendencies seem to have been operating in this period—British support of American imperialism, and growth of the idea of Anglo-Saxondom, or British-American federation. While British opinion did not always approve of American methods, its support of American policy in the Spanish-American War, its encouragement of American acquisition of Hawaii, Cuba, and the Philippines, and its endorsement, if not suggestion, of Theodore Roosevelt's corollary, evince a general disposition to applaud the extension of American power and responsibility. The support of American pretensions was made easier by the growing belief that, since they had a community of interests and ideals, destiny demanded British-American close coöperation to preserve civilization. The pre-war federation movement constituted spiritual preparation for British propaganda efforts directed at America during war; it also explains how British naval policy could consistently urge American naval increases. The author aptly remarks, though, that "In the matter of alliances, Chamberlain outran his colleagues, the government outran the people, both passed the press, and everybody was ahead of the United States."

While the student of international relations, and especially international law, may wish that the scope of the work had been narrowed to permit a deeper and more complete treatment of the diplomatic and legal phases of the American impact, this book helps to fill an important gap in the literature on world politics. The analysis of British opinion as influenced by America will form a useful complement to Professor Thomas A. Bailey's *Diplomatic History of the United States* and to L. M. Gelber's *The Rise of Anglo-American Friendship*. Finally, it provides valuable background for the study of British propaganda and for the examination of plans for an Anglo-American union, federation, or police force. ARTHUR FUNSTON

Der Gedanke der Internationalen Organisation in seiner Entwicklung. By Jacob Ter Meulen. Vol. 2: 1789–1889, Pt. 2: 1867–1889. The Hague: Martinus Nijhoff, 1940. pp. xvi, 373, Indices. Gld. 9.

The merit of directing the attention of scholars to former projects for international organization and opening up a relatively new field of research belongs to Walter Schücking, who published in 1908 his small book *Die Organisation der Welt*. Monographs on some of these projects followed. In 1919 the extraordinary Norwegian Christian L. Lange gave us in French

his *Histoire de l'Internationalisme*, starting with ancient Greece and going up to the beginnings of modern times, later (1926) supplemented by his Hague lectures on *Histoire de la Doctrine Pacifique*. The first work on these topics in English came only in 1931, A. C. F. Beale's *The History of Peace*.

But already in 1917 the Dutchman Jacob Ter Meulen, the distinguished Director of the Library of the Peace Palace at The Hague, writing in German, had begun a great work, intending to analyze all projects of some importance for eliminating war by way of international organization, made during the period 1300-1889. The first volume, covering the epoch from 1300 to the French Revolution, was published in 1917. The first part of the second volume (1789-1870) appeared in 1929. The present second part of the second volume brings the work to a conclusion. The author excluded from his plan the most recent developments, the new Pan American movement, the Hague Peace Conferences, the League of Nations, which were no longer mere projects but historical realities.

It is, of course, impossible, within the framework of a book review, even to mention the wealth of research, information and analysis contained in this volume. Built upon an amazing richness of widely scattered materials, the book undertakes to show the growing faith in international solidarity. Leading personalities in this field and their proposals are carefully analyzed. Let us mention only such names as Bluntschli, Victor Hugo, Lorimer, Frédéric Passy, Field, Renan, E. Burritt, Randal Cramer, Fiore, Novicov, such movements as the International Peace Congresses, the Interparliamentary Union, the Institut de Droit International, the International Law Association, the international workers' movement, the churches. The efforts for international arbitration, for an international court, for codification, for federation, for a United States of Europe, for disarmament, the attitude toward such problems as sanctions, status quo and revision, colonies, neutrality, self-determination are studied and analyzed. The last chapter presents a general survey of all projects since 1300 dealt with in the three volumes. This survey as to the personalities of the authors of such projects, their primary and secondary goals, the juridical character and technique of the proposed international organization, is extremely interesting and revealing. It confirms, for this special field, Goethe's word that everything which is under debate today has already been thought of previously—the task is to think about it again. It also reveals the weaknesses of the conception and the reasons for the failure of such proposals.

The learned Dutch author is at the same time inspired by his warm faith in the universality of this world, where, after all, the states are all living on the same planet, and where one sun gives them all warmth and light and life. He correctly holds that a real solution of the problem of international organization is the *conditio sine qua non* for keeping alive the torch

of human civilization and culture. It is in this sense that the author has chosen as his motto the words of Lamartine: "*Le monde en s'éclairant s'élève à l'unité.*"

JOSEF L. KUNZ

The Geneva Racket, 1920-1939. By Robert Dell. London: Robert Hale, 1940. pp.375. Index. 18s.

This is a continuous account of the international currents which have ebbed and flowed in and about Geneva from the time of the Peace Conference until the surrender at Munich and the outbreak of the Second World War. Mr. Robert Dell, as Geneva Correspondent of the *Manchester Guardian*, was better prepared than most men to present to the world of interested people the course of international events, and their consequences. They are revealed in their stark reality, without embellishment, concealment, or distortion of fact. A friend of the principle of collective security, and at first of the institution which was formed to give it practical effect, and an enemy of aggression and appeasement, no one is in a position to charge Mr. Dell with any desire to make war on the League, its proponents, and its active participants. What is made so clear that no one can miss the tragedy which ensued, is the fact that the "Leaguers" wrecked the League of Nations. The dominant League states (France and England), while seeking approval and support for their own foreign policies and national security, did not care enough about the system as a whole to invoke and enforce sanctions in a controversy where they were not directly concerned. The small states, looking to the League for security and protection, and having given up their special forms of protection for this anticipated support, at length reverted to neutrality, unilateral and regional, in order to escape obligations to a League rupture or conflict, and to escape embroilment in a possible war where power politics had displaced pacts and institutions of peace. The facts established that Great Britain and France controlled the League; the record also establishes that these countries wrecked it when the prescriptions as regards sanctions became unpleasant or inconvenient. Moreover, there seems a causal relation between the Anglo-French reluctance to enforce sanctions and the degree of national interest at stake.

Mr. Dell at the outset declares that the fundamental vice of the Covenant of the League of Nations was its dependence on national sovereignty; and this, he concludes, is the fundamental cause of its failure. A society of nations with each state sovereign he holds to be a contradiction in terms. Absolute sovereignty must be destroyed before war can be abolished. The League should have a federation of continental leagues of Africa, Asia, Europe, and America, rather than a global organization committed to impractical universal principles, and dealing with problems utterly insoluble on a world basis. Moreover, the treaty of peace should have been drafted first, and the League constituted thereafter. Had these three steps been

taken instead of their opposites, Mr. Dell contends that the League would have been a success.

Posited on these false principles, contends Mr. Dell, the League, working through the national sovereignties which composed it, inevitably followed a course of surrender to violations and aggressions, beginning with minor ones, and concluding with the major capitulation to Hitler, beginning with the Runciman mission at Prague and ending with the Munich settlement. Included in this clinical survey are, among others, these instances: the capitulation to Poland over Vilna; Italy's seizure of Corfu; the first and second capitulations to Japan; surrender to Mussolini; the betrayal of the Spanish Democracy; the intervening episodes which failed—the Geneva Protocol, the Locarno Pact, and the Disarmament Conferences; surrender to the Danzig Nazis; the final surrender to Hitler under the caption of "Appeasement"; and the resulting consequence of war. The carping critic could easily charge Mr. Dell with a spirit and tone of "Now it can be told." In the judgment of the reviewer, this does not represent Mr. Dell's point of view. Idealism and its institutions cannot suffer from an examination in the light of realism and fact.

The second part of the book deals with the League and cognate institutions. The League Covenant, together with the organization of the League, the League Secretariat, and the International Labor Organization are subjected to analysis and criticism, neither from the standpoint of the hortatory internationalist who gives unstinted praise; nor from that of the power politician, who works for and thrives on war; nor from that of the legal fictionist who, in following the official document, loses the fact and the substance. It is rather the observation of a practical idealist, disappointed over the failures of the system he believed in, and who, in seeking the reasons for such failure, applies his scalpel without sparing individual or country. A final chapter makes practical suggestions for the reorganization of the League of Nations.

This is a challenging book. Real friends of peace, and collective security advocates who seek to avoid the failures of the past, will read it with patience and care. It will not be pleasant reading, especially for those who decline to face the facts of international life.

CHARLES E. MARTIN

Free Speech in the United States. By Zechariah Chafee, Jr. Cambridge: Harvard University Press, 1941. pp. xiv, 634. Index. \$4.00.

In this book Professor Chafee condenses into one volume all his "ideas, past and present, on freedom of speech." The book is written in a more popular style than some of his earlier works, but is nevertheless thoroughly technical and is a mine of information for lawyers or writers who desire to investigate this important branch of American law.

The first sections of the book relate largely to prosecutions under the Espionage Acts of 1917 and 1918. Many such prosecutions resulted, as

Professor Chafee believes, in grave injustice and a violation of the constitutional clauses protecting freedom of speech. It is impossible to refer in detail to the cases Professor Chafee cites, but mention may be made of the case of Rose Pastor Stokes who was sentenced to ten years imprisonment for writing a letter to a newspaper in which she said: "I am for the people and the government is for the profiteers." This conviction was set aside by the Court of Appeals (264 Fed. 18, erroneously cited as 262 Fed. 18) on the ground that the words used were not a violation of the Act; but in other cases sentences were not only imposed but served for statements made by defendants who, Professor Chafee concludes, "had no real intention to cause trouble, and were only engaged in heated altercations or expounding economic doctrines."

The Federal espionage laws led to the passage of statutes of a similar nature in various States, some of which were enforced in such a way as to do great injury, Professor Chafee points out, not only to the rights of individuals but to the principle that free criticism of the Government is protected by the Constitution. Such laws have even attempted to control teaching in private educational institutions, as illustrated by the Rand School Case in New York, in which an injunction was issued against the continuance of the school, afterwards recognized by the public generally as a valuable institution. The case fell because the Act was repealed before the appeal could be argued.

The California statutes and their enforcement are also reviewed by Professor Chafee with particular reference to the case of Miss Whitney, whose conviction and sentence was sustained by the Supreme Court of the United States because she was a member and attended a meeting of the Communist Labor Party, although the prosecution was unable to show that she had ever written or spoken a word tending to show that she advocated violation of any law. There was a dissent to the decision of the Supreme Court by Justice Brandeis, and Miss Whitney was subsequently pardoned by the Governor of California. He said: "Miss Whitney, lifelong friend of the unfortunate, is not in any true sense a 'criminal,' and to condemn her, at sixty years of age, to a felon's cell is an action which is absolutely unthinkable."

Professor Chafee states the real issue to be "whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law." To hold the former he considers exceedingly dangerous as it leaves inferences to be drawn from words or acts having a vague meaning by juries and judges whose minds may be inflamed by war hysteria.

In some respects the most striking portion of Professor Chafee's book relates to his discussion of the so-called Alien Registration Act of 1940. He points out, what is not generally known, that the first sections of this Act do not really relate to alien registration at all, but constitute an especially severe Espionage Act. These provisions are closely modeled after the

Sedition Law of 1798, subsequently recognized by publicists and historians as a great mistake and which led to the defeat of the party which caused its passage. "The precise language of a sedition law is like the inscription on a sword. What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies."

It was held in the prosecutions following the World War that anything which depicted in an unfavorable light the conduct of one of our allies was calculated to interfere with recruiting and cause insubordination in our armed forces; for this reason a moving picture entitled "The Spirit of '76" was suppressed and its producer sentenced to ten years imprisonment, of which he actually served three.

Professor Chafee concludes from such prosecutions and the language of the statute that any books which criticize the conduct of the British Government or doubt the purity of English war aims (or now, it may be added, which criticize the conduct of the Russian Government or doubt the purity of its war aims) would be subject to confiscation. He suggests, for example, that such a book on the shelves of a professor of history or a university library might cause great embarrassment to the professor or the university even though there was no conviction for having in possession such a pernicious book. Many histories of the United States now in use in the schools might be subject to confiscation for the same reason.

Professor Chafee is particularly emphatic in his conclusion, with which all will agree, that education should not be interfered with by governmental control, and many persons will sympathize with his view that moving pictures should not be prevented from being shown except under circumstances which would justify the suppression of a newspaper, in view of the fact that the radio has now become even a greater engine of publicity than the press.

Professor Chafee's conclusion is well expressed in the following words: "Intolerance can always find some crevice in the administration of the law through which to creep and accomplish its purpose. The only remedy is to build up every day and every hour the opposite spirit, a firm faith that all varieties and shades of opinion must be given a chance to be heard, that the decision between truth and error cannot be made by human beings, but only by time and the test of open argument and counter-argument, so that each citizen may judge for himself."

The book shows an enormous amount of diligent research and is a magnificent production which will undoubtedly remain for many years the most complete work on the subject.

THOMAS RAEBURN WHITE

BRIEFER NOTICES

International Politics. The Western State System in Transition. By Frederick L. Schuman. (New York and London: McGraw-Hill Book Co., 1941. 3rd ed. pp. xxv, 733. Index. \$4.00.) The writer of the present review had the great satisfaction of reviewing the first edition of *International Politics* (A.J.I.L. 1933, p. 803). He then recognized that Professor Schuman had accomplished a remarkable and a unique piece of work in the field of political science. This impression has been amply and eloquently confirmed by the third edition. The first half of this volume is largely as originally written, though subjected to painstaking revision. This revision concerns form and style rather than substance. The author has reformulated some of his conclusions in the light of the amazing events of the past decade. The second half is virtually a review of recent history against the background of precedents and principles set forth in the first half. This volume cannot be classified with many other contemporary books which are ephemeral comments on the passing show. It is a scholarly, analytical work of permanent value. Professor Schuman reveals himself as a political philosopher who clearly understands the present because he so thoroughly understands the past. He thinks in terms of universal principles which are eternally applicable in human affairs. His appeal to historical analogies in this time of international anarchy is often most apposite and impressive. This book should be read with the greatest care by students in the field of political science and by all those who try to understand thoroughly what the author terms "The Western State System in Transition," and those basic principles which continue to govern international politics. In the opinion of the present reviewer, it is the ablest analysis of the subject yet produced by any American scholar.

PHILIP MARSHALL BROWN

Sea Power. By Captain Russell Grenfell, R.N. (Garden City, N. Y.: Doubleday, Doran & Co., 1941. pp. 244. \$2.00.) In this book, a well-known British naval officer attacks the "continental" orientation, since about 1900, of his own government's foreign policy. He deplores England's pre-1914 military commitments to France; the "continental strategy" which killed over half a million British soldiers on European battlefields in the war of 1914-1918; the program of collective security which tied Great Britain to Europe after that war; British acquiescence in naval parity with the United States; the dispatch of another B. E. F. to the Continent in 1939; and much that has happened since then. He denies that England has a vital interest in the Low Countries or even in the Channel ports. Great Britain, he is confident, can defend its island base and sea communications against air and undersea attacks, even should Germany remain in control of all western Europe. One will look far to find a more forthright defense of the traditional concept of sea power, or of the British Navy's ability to play its historic rôle, come what may on the Continent. But one searches in vain for any real appreciation either of Great Britain's inescapable and growing military dependence on the farms, mines, and factories of North America, or of the economic and political as well as military threat to Great Britain implicit in the German conquest of Europe and in the inexorable advance of war technology. Grenfell's book was completed after the fall of France. After anonymous publication in England it is now republished in the United States under the author's name. One must assume, in the absence of contradictory evidence, that all this has been done with the

Admiralty's consent. Yet the views of Captain Grenfell are utterly irreconcilable with the avowed aims and strategy of Great Britain with whom we are now associated in the prosecution of this world war. HAROLD SPROUT

The Naval War College *International Law Situations, 1939* (Washington: Government Printing Office, 1940. pp. vii, 162. Index. 25¢) was prepared again this year, as last year, by Professor Payson S. Wild. Situations involving three general topics are taken up: neutral duties and state control of enterprise; neutrality problems involving distress, submarines, and qualified neutrality; and problems relating to contiguous zones, airplanes, and neutrality. Within each of these general situations a large number of subsidiary matters are discussed briefly. Pertinent documents are scattered liberally throughout the discussions, and there is a fifty page appendix of neutrality and emergency documents. While a goodly number of the matters adverted to are dealt with in regrettably brief fashion, the discussions do contain numerous observations on current developments that will be found useful to the lawyer as well as to the naval officer.

NORMAN J. PADELFORD

Documents on American Foreign Relations, July 1940-June 1941. By S. Shepard Jones and Denys P. Myers. (Boston: World Peace Foundation, 1941. pp. 805. Index. \$3.75.) The third volume of this annual series sustains the high quality of editorship and selection evinced in its predecessors. Materials of this nature are invaluable adjuncts to the understanding and teaching of our foreign policy. All who suppress a possible imaginary distaste for documentary reading and examine the official record will be generously rewarded. The march of events in the international scene has necessitated marked revision of subheading material as arrayed in earlier volumes, but the major divisions of the 1939-1940 edition have been preserved. Under "Principles and Policy" we find the story of the base-destroyer exchange of 1940 and of Japan's accession to the German-Italian Axis in the same month, and the successive statements of President Roosevelt on the attitude of this Government. Some documents of other Governments, such as those depicting the policies of Japan and of Germany, are taken from presumably trustworthy but nevertheless unofficial sources. The wisdom of relying upon unofficial materials might be open to question but the difficulties of procuring authenticated texts and the desire to include all important papers induced the editors to "round out the year's picture." Among the new sections are Canadian-American relations, leasing of naval and air bases, Greenland, United States-Chinese relations, the Three-Power Pact (Axis), war and diplomacy in Eastern Europe, occupied states, belligerent trade restrictions, protection of American holdings abroad, repatriation of American citizens, the program of the Maritime Commission, United States custody and acquisition of foreign ships, foreign propaganda, League of Nations activities at Princeton, and various topics relevant to our national defense effort. It is to be regretted that the tabulation of "important dates" has been discontinued, and that Secretary Hull's "review" of the "whirlwind developments . . . of the nineteen-thirties" was deleted from page 10.

WILSON LEON GODSHALL

French Interests and Policies in the Far East. By Roger Lévy, Guy Lacam, and Andrew Roth. Institute of Pacific Relations Inquiry Series. (New York: Institute of Pacific Relations, 1941. pp. ix, 209. Index. \$2.00.)

Of special interest to all internationally minded people is the present volume, presenting as it does information, both historical and contemporary, of the greatest importance in respect of the relations of France and the Far East. The most valuable part of the volume is a study entitled "A Century of French Far Eastern Relations," by Roger Lévy. First, one reads an excellent account of French cultural relations with this area for the past 100 years. Then follow chapters on French economic relations with China, Japan and Manchukuo, Southeast Asia and the Pacific. The relation of France to the Far Eastern conflict is set forth, and finally a concluding chapter which gives a summary of French interests, together with the author's reactions to the position of France in this quarter of the world — past, present and future. The work of Mr. Lévy is of the greatest value, and makes available in comprehensive form information which in the past has been difficult to obtain. One wonders whether the author is quite sound in his prediction that the interests of France, even though extended in area, are not of sufficient consequence to affect the peace of the Pacific one way or the other. Several documentary appendices add to the importance of the book. A supplement to Mr. Lévy's portion of the book is entitled "The Economic Relations of Indo-China with Southern China," and is authored by Guy Lacam. It merely sets forth and analyzes a number of trade statistics. Andrew Roth, in Part II, has given us a valuable contemporary study bearing the title "French Indo-China in Transition, 1938-1941." This intriguing political transition is dealt with in three periods: from Munich to the outbreak of the European War; during the time of French belligerency, August 1939-June 1940; and from the time of the French surrender to the time of writing. The facts and events of the international power politics game are faithfully recorded. The fate of a colonial empire set adrift due to the mother country's surrender, and subject to the caprices of an Oriental ally of the mother country's victor does not make a charming story. But it is an important one. Messrs. Lévy and Roth have provided one of the better studies in the Institute of Pacific Relations Inquiry Series.

CHARLES E. MARTIN

European Colonial Expansion since 1871. By Mary Evelyn Townsend. (New York: J. B. Lippincott Co., 1941. pp. viii, 629. Index. \$4.00.) Dr. Townsend's study gives a comprehensive and up-to-date survey of imperialistic expansion in Africa, the Near East, and the Far East. Although designed primarily as a text, the volume should serve as an excellent reference work and also as a bird's-eye view of the subject for the general reader. Although the French are no longer "building motor roads through the once trackless Sahara" nor can one "penetrate the mists of this once darkest Africa from the soaring liners of Air France" at the present time, the basic facts of the author's study remain unchanged. The treatment is logically upon a geographical basis. The first section is a brief survey of the development of modern imperialism, the second and largest is devoted to Africa, the third and fourth parts cover the Near East and Middle East, while the last section is devoted to the Far East and was prepared by Professor Cyrus H. Peake. The emphasis of the book throughout is upon the peoples concerned rather than upon the dominant Powers. In fact, the author concludes frankly that unless free access is afforded to the world's raw materials in these backward areas, and unless more tolerance is shown towards the individual, social, and political rights of colonial peoples, instead of a permanent peace we shall have once more "a mere interlude of exhaus-

tion or of preparation for renewed warfare." A criticism might be made in regard to the lists of readings following each chapter. With slight exceptions, only English books are listed. Dr. A. D. A. de Kat Angelino's exhaustive study on colonial policy is not mentioned; none of F. M. Keesing's excellent volumes on the Pacific area are named. Two works on Kenya are listed, whereas W. R. Crocker's *Nigeria* is omitted. The works cited on French Africa and Italian Africa are all too few considering the large number of excellent works in these fields. On the other hand, the author characterizes pointedly most of the works cited—a valuable hint to the student or reader desirous of exploring further. GRAHAM STUART

The Assembly of the League of Nations. By Margaret E. Burton. (Chicago: University of Chicago Press, 1941. pp. xii, 441. Index. \$4.50.) Miss Burton's volume is a valuable one because nothing just like it has previously been published. It is to be characterized primarily as a sober and scholarly factual account of the creation and subsequent operation of the League Assembly. A study of this sort is needed. Even if much of the machinery has collapsed, the League still survives, and the ideal and the need and even some of the organization remain. The early chapters are developed chronologically, and include an excellent summary of the growth of the League idea, with especial reference to the portion which became the Assembly, the formal consideration of the League by the Versailles Conference, and the actual organization of the Geneva institution. The following chapters treat the Assembly topically, taking up such matters as its character, composition, and organization, its committee system, the unanimity rule, the Assembly's rôle as an opinion-forming and policy-making body, its legislative function, and its work in regard to international disputes. Much of the volume is strictly narrative and descriptive in character. The account is written primarily from the Assembly's own official records, which is wise, but if the information and, above all, the "sidelights" which could be gained from personal interviews and other contacts could have been more generously incorporated in the volume it would have gained in liveliness. The author attended the Assembly's sessions for five years. This volume is not a brilliant piece of writing but it makes no pretenses of being such. It is a sound, well-documented, and scholarly study, and as such should prove a welcome addition to the already long shelf of secondary materials on the League. RUSSELL H. FITZGIBBON

International Arbitration and Security. By Gunji Hosono. (Tokyo: Maruzen Co., 1941. pp. 447. Index. \$4.00.) Reading a book on collective security in these hectic days (the review was begun just two hours after Congress declared that a state of war existed between Japan and the United States) may seem to some people too much like studying the rules of navigation while the ship is sinking. To others the mere fact that we are again at war makes a return to fundamentals the more necessary if peace is ever to be satisfactorily organized. This book, written in 1935, describes "the efforts for the organization of peace outside, in, and through the League of Nations during the period between 1919 and 1934." The author, after introducing the reader to the idea of collective security, examines in detail the agreements concluded outside the framework of the League such as the Pan American peace treaties, the Pact of Paris, and various arbitration, conciliation and security treaties. He then enters the domain of the League, pointing out such forlorn landmarks as the Treaty of Guarantee, the Geneva

Protocol, the Locarno Treaties, the General Act of 1928, and the Convention on Financial Assistance. The work ends with an analysis of the problem of security at the Disarmament Conference. In tracing the shifting emphasis from Articles 10 and 16 of the Covenant to Article 19 and the idea of peaceful change, Mr. Hosono points out that too much trust was placed in mere machinery and too few attempts were made to remove the basic causes of war. The collective system of the future, he concludes, requires (1) strength enough to restrain aggression, (2) active participation by all the Great Powers, (3) a respect for treaties and an enforcement of international law, and (4) the adoption of policies on the part of the Great Powers that will conform to the idea of collective security. The chief merit of the book is that it brings together a mass of materials (documents have been extensively used) concerning post-war peace efforts. Unfortunately it is rather loosely organized and not too well written.

FRANCIS O. WILCOX

Twenty Years' Armistice—And After. British Foreign Policy Since 1918. By Sir Charles Petrie. (London: Eyre & Spottiswoode, 1940. pp. vi, 296. Index. 7s. 6d.) The author begins with the inquiry, "Versailles: Crime or Blunder?" The basic weakness of the Treaty of Versailles, and that of Saint Germain and Trianon, was the unreadiness of the Allied and Associated Powers for peace when it came, and their failure to agree on the principle on which peace should be based. The conditions of peace proposed by Lloyd George as the basis of the British elections was an unfortunate factor. Then, the Allies made the mistake of completing the unification of Germany commenced by Bismarck. In other words, there should have been separate treaties with Prussia, Bavaria, Saxony, and other states, rather than one treaty with a consolidated Germany. The commingling of the League with the Peace Settlement was the crowning mistake. Unfortunate also was the exclusion of the German representatives from the preliminary discussions and negotiations. With this as a background, there follows an unfriendly account of British foreign policy for the years following the peace settlement. Lord Curzon is described as a "most superior person." Sir Austen Chamberlain is well treated, as having a definite policy, with the Locarno Pact his greatest achievement. "Uncle Arthur" Henderson is less favorably treated, but not as badly as Sir John Simon, under a chapter entitled "Simple Simon." Eventually British foreign policy enters the "Garden of Eden" during the Secretaryship of Anthony Eden. Then comes Berchtesgaden, the "Abyss," and "Nemesis." A concluding chapter deals with "The Latest Phase." In the opinion of the reviewer, the author overestimates the failures and defects of British diplomacy and diplomats for the period under discussion, and underestimates the difficulties which have been met and the achievements which have been made. Nevertheless, despite the "hindsight" nature of the criticisms, much of truth has been set forth. No realistic approach to present world problems will neglect the author's conclusions. Under titles which seem trivial and even frivolous, a serious discussion is conducted by Sir Charles Petrie which at least points the way from the abyss. Diplomatic orthodoxy of the Neville Chamberlain variety will resent this book. But those who look behind the hollowness of political justifications will find real value in it.

CHARLES E. MARTIN

War and Crime. By Hermann Mannheim. (London: Watts & Co., 1941. pp. x, 208. Index. 10s. 6d.) A course of lectures delivered by the author during February and March, 1940, in Cambridge and in London is presented

here in an expanded version. Under the heading of "War and Crime" two widely different themes are woven together. In Part II of his book Professor Mannheim, an outstanding criminologist, discusses the question of how far war is a causative factor of crime. What the author has to say in this connection deserves careful consideration on the part of students in criminology, but so far as students of international law are concerned, a discussion of the influence of war on crime rates would appear to lie outside the province of their studies. It may well be asked whether the author was well advised in discussing matters purely penological together with the problems included in the other parts of his book where he examines the analogies and differences between war and crime. Here we find inquiries into the legal aspects of the causation of war and crime, an analysis of the mutual characteristics of an unjust war and criminal offenses and, moreover, the similarities between war aims and the aims of punishment. In the course of these discussions, which touch upon problems that are of vital concern to the student of international law, many sound observations will be found. Yet, when Professor Mannheim at the end of his book states that "the difference between war and crime dwindles away to almost nothing if the former conception is restricted to unjust wars"; and again that "the methods suggested for securing peace and for overcoming crime are in many ways identical," it would seem that in making such sweeping statements the author shoots beyond the mark. The reading of this stimulating book leaves in the reviewer's mind the impression that the author while writing the book was not fully alive to the fact that an entirely different atmosphere prevails on a scene where nations, not individuals, are the actors, and consequently there can be no adequate interpretation of the phenomenon of war within the framework of concepts and rules controlling the conduct of men in state communities.

GERHART HUSSERL

La Trajectoire du Crime. By Nico Gunzburg. (Rio de Janeiro: Livraria Jacintho, 1941. pp. vii, 229.) The author of this book, formerly Dean of the Law School of Ghent, Belgium, presents this work by way of appreciation of the friendly reception accorded to him as a refugee in Brazil. He deals with the new Penal Code of Brazil, promulgated December 7, 1940, which goes into force on January 1, 1942. A considerable part of the book treats of the punishment of crimes having an international scope as interpreted by the new statute and other existing Brazilian law. It is this feature which interests us here. Under Article 4 of the new code, the law and jurisdiction of Brazil are made applicable to offenses committed, in whole or in part, upon the national territory, or which even in part have caused or may cause effects upon national territory. This of course is subject to any contrary provisions of treaties or international law. The author contrasts this legislation with the contrary rule of Anglo-American jurisdictions which, with certain exceptions, still hold to the territorial principle. The author gives us an interesting survey out of the abundance of his experience. He measures the advantages and disadvantages of both systems. He believes the Brazilian rule to be in line with the political and social tendencies of modern life. His book shows familiarity with some of the leading cases in this country, as well as with those of Brazil and of Belgium and France. He also refers to changes in the law of Brazil relating to extradition, by reason of the Brazilian Constitution of November 10, 1937, and the decree-law of April 28, 1938. The author has been somewhat restricted in his source material because of writing in a foreign country,

separated from his library and memoranda. He is to be commended for having made available to readers of French an adequate view of important new Brazilian legislation affecting international penal law.

ARTHUR K. KUHN

A History of Hungary. By Dominic G. Kosáry. (Cleveland and New York: Benjamin Franklin Bibliophile Society, 1941. pp. xxxii, 482. Bibliography. Index. \$2.75.) At last a European historian with a new approach to the history of his own country! The author does not set out to present a "clear culture" of his country, as is usually done, but says: "If one writes the history of Hungary, for instance, it must be examined also from the broader point of view of the history of the whole of East Central Europe of which it has formed an organic part and in which it has been one of the most important factors. The historian must place it in the frame of the evolution of East Central Europe and compare it with the history of other neighboring East Central European peoples." The introduction is certainly one of the most interesting chapters of the book. It is to be regretted, however, that, faced by the task of writing in one volume the continuous history of over a thousand years, the author does not stress more the common characteristics of the region, as against purely national history.

For obvious reasons the author devotes two-thirds of his book to the last two hundred years; and yet, the first six hundred years of Hungarian history are of particular interest because, except during the height of Ottoman power, this was the only time when a truly independent country succeeded in barring the classic highway of the *Drang nach Osten*—as dear to the heart of medieval emperors as to that of Hitler. A study of how this was achieved in the past might have thrown some light on the task of the future. By devoting more space to more recent developments the author succeeds, however, in presenting a notable and dispassionate picture of the development of the racial problem and of the impact of modern ideas on the old order in Hungary. He succeeds remarkably in putting in proper relief one of the most interesting figures of the European reform period, Széchenyi, overshadowed in American eyes by the dynamic personality of Louis Kossuth. The "Era of Dualism," on the other hand, could have been greatly shortened; the book also deserved more careful editing of certain passages. There has been a distinct need for a history of Hungary in English written by a contemporary historian. All in all, the author has succeeded in supplying this need.

JOHN PELÉNYI

The Foreign Policy of Thomas F. Bayard, 1855-1897. By Charles Callan Tansill. (New York: Fordham University Press, 1940. pp. xxxix, 800. Index. \$5.00.) This is an important and valuable contribution to the history of American foreign policy. While it is true that Bayard is better remembered for his opposition to the Venezuelan policy of Cleveland's second administration, while he was Ambassador to Great Britain (the author devotes the last part of the volume to the years 1893-1897), a detailed survey of his services as Secretary of State from 1885 to 1889 was well worth the patient investigation of which this handsome work is the fruit. The author not only had access to Bayard's voluminous correspondence, but he has made them the basis of his work. He gives copious extracts of letters to and from Bayard far in excess of those from his official correspondence. In addition, he has used the unpublished letters of Bayard's contemporaries.

The work, therefore, is to a large extent a record of Bayard's activities in his own words. Some might query the title "The Foreign Policy of Thomas F. Bayard, 1885-1897." The fact is that while Secretary of State the foreign policy of the United States was to a large extent Bayard's and not Cleveland's. The "foreign policy" of Bayard 1893-1897 was a point of view in opposition to the policy of the Secretary of State, backed by the President. During Bayard's tenure as Secretary of State there were many matters of importance, some inherited from the previous administration, some left to succeeding governments. Among these were the fisheries and fur-seal questions. There were also the question of Samoa, the Sackville-West episode, the Venezuela boundary. New light is thrown upon them all as a result of Professor Tansill's handling of hitherto unprinted materials. The reversal of the policy of Arthur with reference to the Berlin African Conference of 1884-1885 might have been found worth mentioning. One public service rendered by Bayard in 1885 may be referred to. He prevailed upon a young lawyer from Delaware, John Bassett Moore by name, to take a law clerkship in the Department of State. If Bayard could look back over the years, he would no doubt admit that it was one of the best things he ever did. Bayard was the first American to hold ambassadorial rank, but he was ever an ambassador of good will. He was not one of the greatest of Secretaries of State, but he was high-minded, careful, patient, and, as we now see him, truly patriotic.

J. S. REEVES

Barriers to World Trade. By Margaret S. Gordon. (New York: Macmillan Co., 1941. pp. xii, 530. Bibliography. Index. \$4.00.) Since the United States seems destined to play the major rôle in world trade and finance, a knowledge of the obstacles and restrictions in various countries which interrupt and divert commerce becomes important to American students of international law, politics, and economics. Mrs. Gordon has, therefore, performed a public service in providing a superior volume explaining the maze of trade barriers which were so hastily erected in the dismaying years of the depression and which stayed on as a part of national trade policies in the years of recovery. During and after the financial crises of 1931 there was heavy pressure on currencies and national structures in general, and new protective devices in the form of exchange restrictions were adopted. These in turn gave rise to methods of trading which avoided payments in foreign exchange. Compensation transactions, clearing agreements, and other payments arrangements thus found a place in international commerce, diverting it in large measure into bilateral channels and away from routes of the greatest economic advantage. Import quotas were also used and have generally persisted as part of the economic system. They have, however, tended to maintain prices within the nations employing them at somewhat higher levels than those existing in the world without. Tariff policies following the depression are, of course, dealt with. Altogether the diverse and sometimes confusing forms of trade controls are admirably explained. Remarkably few dubious statements are encountered in the volume; and, considering the merits of the book, it would give an unrepresentative picture to detail them in a short review. The author sticks rather closely to the task of technical description and makes little effort to coördinate the facts presented with the general evolution of recent history. Not much is said of background forces, such as the larger reasons for the multilateral trade policy of the United States as contrasted with that of bilateral balancing

pursued by Germany. Although this is not the only excellent discussion of the trade barriers created between the two world wars, it is, in the reviewer's opinion, the best one available as regards organization and clarity of exposition.

BENJAMIN H. WILLIAMS

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WILBUR S. FINCH



THE THIRD MEETING OF MINISTERS OF FOREIGN AFFAIRS AT RIO DE JANEIRO

By CHARLES G. FENWICK

Of the Board of Editors; Member of the Inter-American Juridical Committee

When the plan of consultative meetings of Foreign Ministers was first proposed at Buenos Aires in 1936, and later developed at Lima in 1938, few considered it as anything more than emergency procedure to meet situations in which prompt and decisive action might have to be taken. There was no thought that a new form of inter-American conferences was being created,¹ that Foreign Ministers would come to the meetings attended by a corps of experts and assistants, that the range of the discussions would cover not a few restricted topics but practically the whole field of inter-American relations, provided only that the particular problem could be regarded as an "emergency" one in the broadest sense of that term. The original conception of a confidential gathering of Foreign Ministers began to break down at the first meeting at Panama in 1939; it broke down still further at the second meeting at Havana in 1940; and still further, indeed almost completely, at the third meeting at Rio de Janeiro in 1942.

The meeting at Panama was called to lay the basis for a common policy of neutrality in the presence of a war in respect to which it seemed possible at that time for the American Republics to remain neutral. The General Declaration of Neutrality adopted at the meeting contained no suggestion of any attitude other than of the strictist neutrality.² The Declaration of Panama, creating the security zone, believed to be a logical development of the right of self-defense on the part of the American States against new methods of maritime warfare, was applied to both belligerents without discrimination. No break in this policy occurred until the invasion of Belgium and Holland, when, at the instance of the Government of Uruguay, a collective protest was made against the violation of international law.³ This, however, did not, strictly speaking, constitute a departure from neutrality, but rather a reaffirmation of the rights of neutrals against a lawbreaker.⁴ Nor did the meeting at Havana go beyond the limits of collective neutrality. The Convention on the Provisional Administration of European Colonies

¹ Efforts were made by a number of delegates at the conference at Lima to have the five-year interval between inter-American conferences reduced; and it does not appear that the advocates of the shorter interval were aware that the meetings of Foreign Ministers might serve the same purpose.

² The declaration refers to "the standards of conduct, which, in conformity with international law and their respective internal legislation, the American Republics propose to follow, in order to maintain their status as neutral states and fulfill their neutral duties, as well as require the recognition of the rights inherent in such a status, . . ."

³ *Department of State Bulletin*, May 25, 1940, Vol. II, p. 568.

⁴ See C. G. Fenwick, "The Inter-American Neutrality Committee," this JOURNAL, Vol. 35 (1941), p. 12.

and Possessions in the Americas and the Act of Havana both contained provisions indirectly condemning the aggression of Germany; but their concrete stipulations were strictly defensive measures which might readily be held consistent with an attitude of technical neutrality.⁵

By the time of the passage of the Lease-Lend Act, in March, 1941, it was clear that a revision of the General Declaration of Neutrality of 1939 was in order. The conduct of the United States could no longer be squared with the standards of Panama, however justifiable it might be under the changed conditions.⁶ It was not, however, until the sudden attack of Japan on December 7 that a definite proposal was made for a new meeting of Foreign Ministers. On December 9, 1941, the Foreign Minister of Chile, Señor Rossetti, addressed a communication to the Chairman of the Governing Board of the Pan American Union proposing that "in view of the unjustified aggression against the United States by a non-American Power, and pursuant to Resolutions XV and XVII adopted by the Habana Meeting of Consultation in July, 1940," the Chairman should consult with other American Governments on the advisability of convoking a third meeting of Ministers of Foreign Affairs of the American Republics "to consider the situation that has arisen and to adopt the most adequate measures demanded by the solidarity of our nations and the defense of the Hemisphere."⁷ A special com-

⁵ For the texts of the declarations and resolutions approved at Havana, see this JOURNAL, Supp., Vol. 35 (1941), pp. 1-32.

⁶ For the controversy on the question of justification, see E. Borchard, "War, Neutrality, and Non-Belligerency," this JOURNAL, Vol. 35 (1941), p. 618, and Q. Wright, this JOURNAL, Vol. 34 (1940), p. 680, and Vol. 36 (1942), p. 8.

⁷ *Third Meeting of the Ministers of Foreign Affairs of the American Republics: Special Handbook Prepared by the Pan American Union*, p. 1.

The day following the communication from Chile, the Government of the United States addressed a similar communication to the Director General of the Pan American Union, to which was attached a statement of the reasons for the meeting, reading in part as follows:

"The American Republics, at the Inter-American Conferences held in Buenos Aires, Lima, Panama, and Habana have jointly recognized that a threat to the peace, security, or territorial integrity of any American Republic is of common concern to all.

"In the Fifteenth Resolution adopted by the American Republics at the Consultative Meeting held in Habana in July of 1940, and entitled 'Reciprocal Assistance and Coöperation for the Defense of the Nations of the Americas,' the American Republics declared that 'any attempt on the part of a non-American state against the integrity or inviolability of the territory, the sovereignty, or the political independence of an American state shall be considered as an act of aggression against the states which sign[ed] this declaration,' and further declared that in case such acts of aggression are committed against an American state by a non-American nation 'the nations signatory to the present declaration will consult among themselves in order to agree upon the measure[s] it may be advisable to take.'

"On December 7, 1941, without warning or notice, and during the course of negotiations entered into in good faith by the Government of the United States for the purpose of maintaining peace, territory of the United States was treacherously attacked by armed forces of the Japanese Empire.

"The course of events since the outbreak of war in Europe in 1939 clearly demonstrates that the fate of every free and peace-loving nation of the world hinges upon the outcome of the present struggle against the ruthless efforts of certain Powers, including the Japanese Empire, to dominate the entire earth by the sword.

"The wave of aggression has now broken upon the shores of the New World.

"In this situation that menaces the peace, the security and the future independence of the Western Hemisphere, a consultation of the Ministers of Foreign Affairs appears to be of urgent desirability."

mittee was appointed by the Governing Board of the Pan American Union to consider the replies received from the governments and to formulate a report, including a draft of a program. The draft program was approved by the Governing Board on December 17, 1941, with the understanding that, in addition to the observations already made by a number of governments, other observations received later would be transmitted to the meeting.³ The meeting convened at Rio de Janeiro on January 15 and adjourned on January 28, 1942.

Section I of the program dealt with "The Protection of the Western Hemisphere," and under it were included: (A) the examination of measures to curb alien activities carried on within the jurisdiction of any American Republic that tend to endanger the peace and security of any American Republic; and (B) the consideration of measures which might be undertaken by the American Republics now for the development of certain common objectives and plans which would contribute to the reconstruction of world order.

Section II, dealing with "Economic Solidarity," called for the consideration of measures to be taken in respect (1) to control over exports of strategic raw materials; (2) the increased production of such materials; (3) the allocation of imports essential to the domestic economy of each country; (4) the maintenance of adequate shipping facilities; and (5) the control of alien financial and commercial activities. The additional "observations" made with respect to the program by a number of governments would have been of considerable importance but for the fact that the regulations for the meeting, approved by the Governing Board of the Pan American Union, while restricting (Art. 4) the introduction of "new topics," made provision for the introduction by each Minister of "projects" bearing upon the program, which, in the case of the governments in question, covered practically the same ground as their observations.

As a rule the opening sessions of international conferences are merely perfunctory gatherings. But in the case of the meeting at Rio de Janeiro the keen interest of the delegates in forecasting the attitude of certain of their number whose positions were still in doubt led them to look for a word or a phrase in the addresses that might indicate which way the wind was blowing. Continental solidarity was to be put to the test. Nine governments had already undertaken to follow the United States into the war. Others had already broken off diplomatic relations. Would the remaining governments go that far? Doubtless it was premature to ask an answer to this question;

³ For the text of the Program, see *Third Meeting of the Ministers of Foreign Affairs of the American Republics: Program and Regulations*, Pan American Union, 1941. The regulations under which the meeting was held were prepared by the Governing Board of the Pan American Union in pursuance of a resolution (XVII) adopted at the Havana meeting in 1940; and after submission to the governments were approved on June 4, 1941. English version in this JOURNAL, Supp., Vol. 35 (1941), p. 181. The *Diario* of the meeting, Vol. I, No. 1, also contains the program and the regulations, in Portuguese.

for the very purpose of the meeting was to find an answer by means of the procedure of consultation. In his address of welcome President Vargas laid stress upon the primacy of the problem of defense, but refrained from specifying the form defense should take. A plenary session followed, and Sr. Aranha was elected Permanent President of the meeting. He spoke of the gravity of the situation and called for "common action" and "continental organization" to protect America against the fate of Europe. Under Secretary of State Sumner Welles, surveying the conditions under which the United States was attacked and under which the obligations of continental solidarity had been brought into effect, recognized the full freedom of action of each of the governments, observing that each one of them had already determined, and would continue to determine "in its own wisdom the course which it will pursue to the best interest of its people in this world struggle." Alone of the speakers, the Foreign Minister of Uruguay, Sr. Guani, announced that he was prepared to support a resolution providing for a rupture of diplomatic relations with the aggressor countries. The Foreign Minister of Mexico, Sr. Padilla, appeared to express the sentiment of the meeting as a whole when he insisted that the attack upon the United States was not an attack upon one American country only; it was an attack upon the whole of America.⁹

A second plenary session was held on January 16 to organize the committees and subcommittees to which the various problems of the program would be assigned for detailed study.¹⁰ As at Panama and at Havana, the procedure was followed of appointing committees corresponding to each of the two sections of the program. Both the First Committee, and the Second Committee on "Economic Solidarity," consisted of representatives of the full membership of the meeting, so that the sessions of these committees differed only in form from plenary sessions of the meeting itself. The First Committee, on the "Protection of the Western Hemisphere," known also as the "Political Committee," was obviously the more important of the two, and the chairmanship of it fell naturally to Sr. Aranha as presiding officer of the meeting. Sr. Turbay of Colombia was made reporter. Two subcommittees were created, the first, with Sr. Fabrega of Panama as chairman and Sr. Conchoso of Uruguay as reporter, dealt with subversive activities, continental solidarity, the "attitude of America in the presence of war," and coöperation between military staff officers. The second subcommittee, with Sr. Argaña of Paraguay as president and Sr. Arroyo of Guatemala as reporter, dealt with post-war problems, the juridical organization of the continent, the Red Cross and public health, communications, penal colonies, and the humanization of war.¹¹ With the creation of these committees and

⁹ The texts of the addresses at the opening session may be found, in Portuguese, in the *Diário* of the meeting, Vol. I, No. 2. The texts used in this article from the Final Act are taken from the *Department of State Bulletin*, Feb. 7, 1942, Vol. VI, pp. 117-141, and reprinted in this JOURNAL, *Supp.*, p. 61 *et seq.* ¹⁰ *Diário*, Vol. I, No. 3, p. 2.

¹¹ Each of the two subcommittees of the First Committee consisted of ten Ministers, selected by lot, with Brazil, in the person of the chairman of the committee, represented on

subcommittees, the character of the meeting changed from that of a confidential gathering of the whole body of Foreign Ministers to confidential gatherings of the smaller groups to which the particular topics were assigned. The results of the deliberations of these smaller groups were "reported" to the full committee, which, holding sessions which were practically public, gave in most cases automatic approval to the work of the subcommittees.¹²

Before either the committees or the subcommittees could proceed with their tasks it was first necessary to distribute among them the various "projects" introduced by the delegations. These projects reached the high figure of 81, and it was to be expected not only that the proposals they made would not always be confined to the one topic on the program but that they would duplicate one another.¹³ Moreover, it was inevitable that, having introduced a particular project, the delegates of the states in question would be concerned not merely with the substance of the proposals made but with the form in which they were presented. This threw upon the subcommittees the task of piecing together as best they could the several projects dealing with a given topic, keeping the "Consideranda" (as the "Whereas" clauses are known) of one project and part of its resolutions and adding something from the "Consideranda" of another project and perhaps part also of its resolution. In many cases, however, the projects were kept intact and adopted by the subcommittee without appreciable change.¹⁴

The problem of curbing alien activities had been given first place on the

both. The members of the five subcommittees of the Second Committee were fewer in number and were selected by the chairman of the committee. While the membership of the subcommittees was fixed, delegates and technical assessors were free to attend meetings of any subcommittee, and to speak, but not to vote. *Diario*, Vol. I, No. 4, p. 3. For the membership of the two main committees and their respective subcommittees, see *Diario*, No. 6.

The fact that each of the subcommittees of the First Committee had a number of topics assigned to it made it necessary for the chairman to nominate "sub-reporters" who became responsible for the particular topic assigned to them. *Diario*, No. 5, p. 9.

The Secretariat of the meeting was elaborately organized, having at its head, as Secretary General, an experienced Brazilian diplomat, Sr. José de Paula Rodrigues Alves. Special secretaries were assigned to each of the committees and subcommittees and to each of the separate delegations.

¹² For comment on this feature of the meeting, see below, pp. 198-199.

¹³ The meeting was well along before it was possible to find out the particular committee and subcommittee to which certain projects had been assigned. The distribution may be found in the *Diario*, Vol. I, No. 7, p. 4. The physical task of mimeographing so many projects and the fact that the time limit fixed by the regulations for their presentation was extended delayed considerably the work of the subcommittees.

¹⁴ In order to accomplish their work in so short a time the subcommittees were obliged to work fast and furiously. Great credit is to be given to the reporters for their skillful handling of the projects. But unfortunately, as will be pointed out later, it was often impossible for one subcommittee to know what another was doing even when their objects were closely related; nor was it physically possible for delegates interested in more than one problem to attend different subcommittee meetings held simultaneously. See the complaint of El Salvador on this point. *Diario*, No. 3, p. 6.

program of the meeting, and to it the first subcommittee of the First Committee gave foremost consideration. Among the projects presented was one from the United States (No. 22) reciting the various "acts of aggression of a non-military character" inspired and directed by members of the "Tripartite Pact," and proposing an elaborate series of measures to be taken by the American Republics to counteract such acts.¹⁵ The resolution (XVII) adopted by the meeting follows closely the lines of the American project, omitting specific reference, however, to "members of the Tripartite Pact," and transferring the proposed measures of control from the text of the project to an attached "Memorandum." The Emergency Advisory Committee for Political Defense, upon which it was proposed by the American project that each State should have a representative, was accepted in the form of a committee of seven members, as proposed in the project of Uruguay. The "measures" of control proposed by the United States were put in the form of a recommendation rather than in that of a positive obligation. The memorandum in which they are drawn up covers four main heads: (A) Direct control of dangerous aliens by the requirement of registration, restriction of freedom of movement, prohibition of the possession of firearms and of radio transmitting instruments and other instruments of espionage and propaganda, limitations upon travel and change of residence and the prohibition of membership by such aliens in organizations controlled by the governments of the Tripartite Pact or by governments subordinated to them or working in their interest; (B) the prevention of abuses of citizenship; (C) the regulation of transit across national boundaries; and (D) the prevention of acts of "political aggression" by means of penalties directed against the obstruction of war efforts, propaganda, and sabotage, and measures for the supervision and censorship of communications. While the memorandum has not the force of the resolution itself, it is presented as a sort of model code of the scope of possible national legislation in respect to subversive activities.¹⁶

¹⁵ The Uruguayan project (No. 57) contains a preamble reciting the action taken by the American Republics prior to the meeting at Rio. Compare, on this point, C. G. Fenwick, "Intervention by way of propaganda," this JOURNAL, Vol. 35 (1941), p. 628. Other projects considered by the subcommittee were those presented by Venezuela (2), and Peru (78).

¹⁶ For the text of the resolution, see this JOURNAL, Supplement, p. 76. While the distinction between a resolution of the meeting and a mere recommendation is not strictly observed in the "conclusions" of the meeting presented in the Final Act, in general a "resolution" relates to a matter in which the Ministers meant to assume some degree of legal obligation however loosely formulated, while a "recommendation" is merely that and nothing more. In one case (II. Production of Strategic Materials: see below, p. 193), the document is in part a recommendation and in part a resolution.

On Feb. 25, the Governing Board of the Pan American Union, acting in accordance with the provisions of the Resolution on Subversive Activities, decided that the Emergency Advisory Committee for Political Defense should be composed of members designated by Argentina, Brazil, Chile, Costa Rica, United States, Uruguay and Venezuela. Montevideo was designated as the seat of the committee, and its first meeting fixed for the following April 15.

Under the same head of subversive activities were included several other projects, two of which, from the Dominican Republic (No. 51) and from Argentina (No. 62), proposed that the date of the meeting of the Inter-American Conference for the Coördination of Police and Judicial Measures, planned to be held in September, 1942, should be held earlier. These projects were adopted by the meeting as Resolution XVIII, advancing the date of the meeting of the conference to May, 1942, and at the same time, in pursuance of a proposal coming from the Uruguayan delegation (No. 58), recommending that the conference study the possibility of broadening the South American Police Convention of 1920, making it applicable to all the countries of the continent and incorporating in it provision for an "Inter-American Registry of Police Records."¹⁷ A project presented by Panama (No. 63), looking to the coördination by the American Governments of their national intelligence and investigation services with the object of eliminating more effectively espionage, sabotage and other subversive activities, was adopted practically without change as Resolution XIX, under the title "Coördination of the Systems of Investigation." A project presented by Chile (No. 79), reaffirming the principle of international law in accordance with which "aliens residing in an American State are subject to the jurisdiction of that State," so that the countries of which they are nationals "cannot lawfully interfere, directly or indirectly, in domestic affairs for the purpose of controlling the status or activities of such aliens," was adopted without change, as Declaration XX, under the title, "Reiteration of a Principle of International Law."¹⁸

The second of the four topics assigned to the first subcommittee of the First Committee on the Protection of the Western Hemisphere was that of "Continental solidarity." This broad subject, although not appearing specifically on the program of the meeting, was there by necessary implication; for whatever legal basis there might be for concerted action in defense of the continent was to be found in the meaning of that oft-repeated phrase. "Continental solidarity"—what did it mean now that the abstract language of treaties and declarations was to be reduced to specific acts, now that words were to be converted into deeds? In 1936, at Buenos Aires, there had been no more than the acceptance of the principle, with no element of contractual obligation. "In the event that the peace of the American Republics is menaced . . .," said the convention, any government shall consult with the other Governments of the American Republics, "which, in such event, shall consult together for the purpose of finding and adopting methods of peaceful coöperation." There was scarcely more than a suggestion that as a

¹⁷ For the text of the resolution, see this JOURNAL, Supplement, p. 80.

¹⁸ For the background of this problem, see C. G. Fenwick, "The Monroe Doctrine and the Declaration of Lima," this JOURNAL, Vol. 33 (1939), p. 257. The continued reiteration of the "principle" to which the Chilean project referred is an indication how strongly a number of States feel on the subject.

result of consultation some form of joint action might be taken.¹⁹ Two years later the Declaration of Lima, in reaffirming the "continental solidarity" of the American Republics, proclaimed "their common concern and their determination to make effective their solidarity." But while their "respective sovereign wills" were to be coördinated by the procedure of consultation, it was understood that the governments would "act independently in their individual capacity."²⁰ The meeting at Panama, in 1939, went somewhat further. In addition to ratifying the Declaration of Lima, it proclaimed a "security zone," which, if not accepted by the belligerents after joint representation, could be enforced by measures taken "individually or collectively," to be determined by consultation when the occasion arose.²¹

It was the meeting at Havana in 1940, however, that gave to continental solidarity something approaching the contractual character of "collective security." Confronted with developments in the war which not only threatened the maritime communications of the American States but forecast transfers of American territory which might directly affect the security of adjacent American states, the meeting went the full length of declaring: "That any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered as an act of aggression against the States which sign this declaration."²² Again no effort was made to agree in advance upon specific measures of coöperative defense; consultation was to take place "in order to agree upon the measure[s] it may be advisable to take." But no doubt was left as to the obligation to take some such measures; for the declaration goes on to refer to the negotiation of "complementary agreements so as to organize coöperation for the defense and the assistance that they shall lend to each other in the event of aggression such as those referred to in this declaration."

Did the obligations assumed at Havana call for a declaration of war by each of the American Republics against the Powers that had made war upon the United States? No one interpreted them as having that legal effect. Nine States had already joined the United States in the war;²³ but their action was regarded as a matter of individual policy only. Did the Havana

¹⁹ On the scope of the Buenos Aires convention, see C. G. Fenwick, "The Inter-American Conference for the Maintenance of Peace," this JOURNAL, Vol. 32 (1937), p. 201; Perkins, *Hands Off: A History of the Monroe Doctrine*, p. 351.

²⁰ For the text of the declaration, see this JOURNAL, Supp., Vol. 34 (1940), p. 199.

²¹ See Fenwick, *American Neutrality: Trial and Failure*, p. 129 ff.

²² For the text, see this JOURNAL, Supp., Vol. 35 (1941), p. 15. It is a question whether the sovereignty of the United States over Hawaii and the Philippines was in the thought of the delegates at Havana. Certainly an attack was not looked for from that quarter at the time. But this issue was closed by the fact that Germany and Italy had joined Japan in the war.

²³ Costa Rica, Cuba, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, and Panama.

Declaration call for a collective rupture of diplomatic relations with the Axis Powers? ²⁴ The United States did not make such a claim directly. But the suggestion was clearly made that some restrictions upon the embassies and legations of the Axis Powers were a necessary measure of continental defense against the subversive activities of the Axis Powers. In his address at the opening session of the meeting, Under Secretary of State Sumner Welles had emphasized that, while it remained for each of the American Republics to determine "in its own wisdom the course which it will pursue to the best interest of its own people in this world struggle," yet all were convinced that in accordance with the provisions of inter-American agreements and in the spirit of continental solidarity "those nations which are not engaged in war will never permit their territory to be used by agents of the Axis Powers in order that these may conspire against, or prepare attacks upon, those Republics which are fighting for their own liberties and for those of the entire continent." It was well known, Mr. Welles continued, that in time of peace the embassies and consulates of the Axis Powers had sought to undermine inter-American relations. Now, with ten of the American Republics at war, "the continued presence of these Axis agents within the Western Hemisphere constitutes a direct danger to the national defense of the Republics engaged in war." Hence he insisted, "the preëminent issue presented is solely that those Republics engaged in war shall not be dealt a deadly thrust by the agents of the Axis ensconced upon the soil, and enjoying the hospitality of others of the American Republics." ²⁵

Other delegations, however, were prepared to force the issue. Mexico, Venezuela and Colombia united in presenting a project (No. 21) calling for the breaking off of "political, commercial and financial relations" with Germany, Italy and Japan. The proposed resolution was drafted in categorical terms, to the effect that in consequence of the principles of continental solidarity accepted at Lima and at Havana, the acts of aggression committed against one of the American Republics by Japan, Germany and Italy must be considered as "acts of aggression against all of them and as an immediate threat to the liberty and independence of the Western Hemisphere"; in con-

²⁴ While this question constituted the dramatic interest of the meeting, it was not specifically on the program, coming there only as one of the measures that might be taken for the defense of the hemisphere.

²⁵ For the text of the address, see *Department of State Bulletin*, Jan. 17, 1942, Vol. VI, p. 55. Inasmuch as a right to engage in the subversive activities referred to by Mr. Welles was not included in the privileges accorded to diplomatic agents, it was theoretically possible to suppress them without actually closing the embassies and legations. But the practical difficulties would doubtless have been insuperable. Compare the statement made by Secretary Hull at the Havana Conference of 1940, *Department of State Bulletin*, Aug. 3, 1940, Vol. III, p. 65. The Resolution on Subversive Activities (XVII) does not appear to extend to the embassies and legations of the Axis Powers so as to restrict their use to purely diplomatic functions—due doubtless to the concentration of interest upon a rupture of diplomatic relations which would have prevented their use altogether.

sequence (Art. 3) "none of them can continue to maintain political, commercial or financial relations" with those governments.²⁶ The project thus left no choice as to the action to be taken by the American Governments which had not as yet broken off relations. The subcommittee felt that, in view of its importance the project should be submitted directly to a plenary session of the First Committee.²⁷ Argentina and Chile refused to accept it in its categorical form, and it was accordingly phrased so as to permit them to take action when they found it convenient to do so, the phrase adopted being that the American Republics might act "in accordance with the procedures established by their own laws and in conformity with the position and circumstances obtaining in each country in the existing continental conflict."²⁸ The negotiations were prolonged and great effort was made to find a formula which would amount in some degree to collective action. In the end the majority of nineteen gave way to the minority of two so as to preserve unanimity, the resolution as finally adopted reading:

The American Republics, in accordance with the procedures established by their own laws and in conformity with the position and circumstances obtaining in each country in the existing continental conflict, recommend the breaking of their diplomatic relations with Japan, Germany and Italy, since the first-mentioned State attacked and the other two declared war on an American country.

Even if the article had not been drafted in terms of a "recommendation," rather than of an agreement to act, the opening clauses would have given the fullest liberty of action to Argentina and Chile. The drafting of the article is defective in that the qualifying clauses relate to "recommend" rather than to "breaking of"; but the sense is clear enough.²⁹ It is of significance that once diplomatic relations have been broken they cannot be

²⁶ For reasons not found in the record, the preamble of the project, putting the resolution in its proper setting, disappeared in the course of the discussions. This happened in the case of several other important resolutions which appear in the Final Act in somewhat truncated form. In the subcommittee meetings the procedure followed was to seek agreement first upon the substance of the resolution (*matéria propiamente resolutive*) and to leave it to the reporter to formulate the preamble expressing the "doctrinal matter." See *Diario*, Vol. I, No. 6, p. 11.

²⁷ The submission of the problem by the subcommittee to the full committee did not actually result in general discussion of the question in that committee, but rather left it to an informal subcommittee of the States whose interests were more deeply involved.

²⁸ It is not clear whether this saving phrase preceded or followed the proposal of Argentina to change "cannot continue" (*no podrán continuar*) relations to "can not-continue" (*podrán no continuar*), which brought impatient comments from the Mexican delegate at a plenary session on Jan. 23.

²⁹ Had the article been drafted under less pressure, the inconsistency would doubtless have been avoided of a collective recommendation by the American Republics to do what 80% of them had already done, apart from the fact that some of them were actually at war. The Costa Rican delegate, Sr. Echandi Montero, felt it necessary to state that his vote for the recommendation did not mean any lessening of the responsibilities of Costa Rica as a belligerent. *Diario*, Vol. I, No. 13, p. 5.

restored prior to common consultation (Art. 4), although the consultation itself may not necessarily lead to a collective decision.

Before the close of the meeting all but Argentina, Chile and Ecuador had announced the breaking off of diplomatic relations. Ecuador had delayed pending the settlement of its boundary controversy with Peru, but took action formally on January 29, the next day following the close of the meeting. Brazil took its decision in advance of the closing session, but reserved public notification until that occasion. Following his formal address at the closing session of the meeting, Sr. Aranha made the dramatic announcement. Brazil must "stand by its word, . . . in consequence of the recommendations of the Third Consultative Meeting of Foreign Ministers, Brazil has broken diplomatic and commercial relations with Germany, Italy and Japan." Asserting that the structure of Pan Americanism was being put to the test, Sr. Aranha declared that "we are fulfilling our duty as Americans."³⁰ In thus affirming that the breaking off of diplomatic relations by Brazil was based squarely upon the obligations assumed at Havana, Sr. Aranha indirectly challenged the position taken by Argentina and Chile.³¹ Sr. Padilla, of Mexico, who followed him, appealed by name to the two "great brother-peoples" and expressed the confidence that before long they too would be found in the constellation of the American firmament.³²

Under the same head of "Continental Solidarity" the first subcommittee approved a number of other projects, one from Paraguay (No. 1) calling for a consultative meeting in the case of the violation, or threat of violation, of a duly ratified treaty between two or more States of the continent. The project was modified by the subcommittee so as to limit it to "treaties of such a nature as to put the solidarity of America in grave peril"; and the declaration (XXI) was adopted with that limitation.³³ The reference to the pending controversy between Ecuador and Peru was clear; and, consistently with its attitude in regarding the controversy as not one for submission to inquiry or arbitration under inter-American agreements, Peru entered a reservation to the declaration to the effect that "the project voted does not refer to the defense of the American hemisphere against dangers from with-

³⁰ For the text of the address, see *Diario*, Vol. I, No. 15, p. 12.

³¹ In point of law, however, Argentina and Chile might still assert that an indefinite obligation, such as that taken at Havana, could only be made definite by the individual decision of the parties obligated. Technically speaking, there was no more legal obligation to break off diplomatic relations than there was to declare war. But, under the circumstances, "legal" obligations were not being too meticulously considered; it was a question of the spirit in which agreements were made and of what each nation felt it must do in accordance with its own interpretation of them. Argentina's position was set forth in a letter of Vice-President Castillo, which was read at the second plenary session of the meeting on Jan. 16. See *Diario*, Vol. I, No. 3, p. 2.

³² See *Diario*, Vol. I, No. 15, p. 14, where, however, the address is not reported verbatim, the specific mention of Argentina and Chile being omitted.

³³ For the text of the declaration, see this JOURNAL, Supplement, p. 82.

out the continent and it is therefore not properly on the program of the meeting." ³⁴ The reservation also states that in any case the resolution is not applicable to controversies which the parties have already submitted to a special jurisdiction. ³⁵ Two other projects, one presented by Haiti (No. 43) and another by Panama (No. 76), bore upon the pending controversy between Ecuador and Peru, although without reference by name to the two countries. These were combined by the subcommittee into a single project which was adopted by the meeting as a resolution (XXIII) under the title, "Condemnation of Inter-American Conflicts." The preamble recites the need of a closer union on the part of the American Republics in consequence of the war, and appeals to "the spirit of conciliation of the various Governments to settle their conflicts by recourse to the inter-American peace agreements formulated during the course of the recent Pan American conferences, or to any other judicial machinery." At the same time the resolution encourages the efforts of the countries which were endeavoring to reach a peaceful solution of the existing differences between American countries.

A project presented by Ecuador (No. 29), reciting that the "good neighbor" policy was a "general criterion of right and a source of guidance in the relations between States" and that it prescribes "respect for the fundamental rights of States as well as coöperation between them for the welfare of international society," and declaring that the policy is "a norm of the positive international law of the American Continent," was likewise approved by the subcommittee and adopted, with slight modification, as Declaration XXII of the meeting. ³⁶

A third head under which the first subcommittee of the First Committee classified the projects before it, was entitled "Attitude of America in the presence of war." A project (No. 20), presented by Mexico but signed also by the United States, Venezuela, Cuba, Colombia, Bolivia and Costa Rica, called for the "wholehearted adherence to and the support" by the American Republics of the principles contained in the "Atlantic Charter," the text of which was reproduced in the resolution. In justification of the resolution it was said that the principles contained in inter-American agreements and the fact that the American Republics were now on the side of the forces of liberty in their struggle against brute force and barbarism made it necessary "to formulate common points of view" with respect to measures of reconstruc-

³⁴ The Peruvian delegation called attention to the fact that the regulations of the meeting, approved by all of the governments, prescribe the necessity of unanimous agreement to changes in the program.

³⁵ Compare the reservation made by Peru to the resolution on the Inter-American Juridical Committee, below, note 49; as well as the reservation made by Peru at Havana to the resolution on the peaceful solution of conflicts, this JOURNAL, Supp., Vol. 35 (1941), p. 28.

³⁶ The declaration well illustrates the tendency in Latin America to take a broad conception of legal principles and to find in the moral law between individuals a basis of law between States. It may be noted, however, that the phrase "positive international law" in the Ecuadorean project became "international law" in the declaration.

tion after the war. The subcommittee approved the project, adding a final paragraph, suggested by the Mexican delegate, expressing the belief that when peace should come "the aspirations of the American Republics should be included in the principles upon which the international order should be based." Objection appears to have been raised in plenary session of the committee whether it was appropriate that the American Republics should go on record in favor of a statement of principles which was not of American origin, some degree of what might be called "continental isolationism" appearing to be in evidence among certain of the delegates.³⁷ The result was that the draft project was toned down to a weak statement (XXXV) that the meeting resolved "to take note of the contents of the Atlantic Charter," and to express to the President of the United States its satisfaction with the inclusion in that document of principles which constitute a part of the juridical heritage of America, in accordance with the provisions of the Convention on the Rights and Duties of States approved at the Seventh International Conference of American States, held at Montevideo in 1933.³⁸

A project (No. 28) presented by Panama was directed against the diplomatic representation by an American Republic of the interests of a non-American State. The proposed resolution, after reciting the fact that the

³⁷ In the preamble of the Mexican project reference had been made to the Joint Declaration of Continental Solidarity, adopted at Panama, the third paragraph of which read as follows:

"That these principles are free from any selfish purpose of isolation, but are rather inspired by a deep sense of universal coöperation, which impels these nations to express the most fervent wishes for the cessation of the deplorable state of war which today exists in some countries of Europe, to the grave danger of the most cherished spiritual, moral and economic interests of humanity, and for the reëstablishment of peace throughout the world—a peace not based on violence, but on justice and law."

The project had thus an anti-isolationist tendency.

³⁸ No record of the discussions is available to indicate whether exception was taken to the articles of the charter on their own merits. They are obviously open to constructive criticism, and there was reason enough why, in the short time available for discussion, many of the delegates would have preferred an original statement of peace aims of a more comprehensive character. Compare Resolution (XXV) on Post-War Problems, below, p. 187. The *Diario*, No. 11, p. 15, speaks of a special "Committee of Five" appointed to revise the draft of the subcommittee.

The omission of the elaborate preamble of the original project, which had been reported intact by the subcommittee, was unfortunate; for the preamble set forth the connection between inter-American principles and those of the Atlantic Charter. A number of delegates were heard to observe that the resolution, as adopted, was so little of a compliment to the authors of the charter that it might better have been omitted altogether.

Consistently with its attitude taken at previous meetings, Guatemala entered a reservation announcing that, while it accepted fully the principles of the Atlantic Charter, in respect to its rights to Belize it made the same reservation made at Panama (see Declaration of Panama); and that it stood by the resolutions and the convention adopted at Havana (see Act of Havana; The Question of Belize; and Convention on the Provisional Administration of European Colonies and Possession in the Americas, Art. XVIII, this JOURNAL, Supp., Vol. 35 (1941), pp. 18, 28). For the question of Belize, see Gustavo S. Gálvez, *El Caso de Belice, a la Luz de la Historia y el Derecho Internacional*, Guatemala, C. A. 1941; F. Asturias, *Belice*, Guatemala, C. A. 1941.

existence of a state of war and the breaking off of diplomatic relations by a non-American State had led an American State (unnamed) to ask the others permission to undertake to represent the interests of other non-American States with which the country so requested was at war or with which it had broken off diplomatic relations, and that this representation was incompatible with continental solidarity, declared that no American State, signatory of the Fifteenth Havana Resolution (on Reciprocal Assistance and Coöperation) could accept such representation, and those who had already done so should decline to continue it. The project, having been held up for a time by the subcommittee pending the action of other committees upon related matters, was approved by the subcommittee and was finally adopted in the form of a recommendation (XXXVI) "that no American State shall authorize another American State to assume before its Government the representation of the interests of a non-American State with which it has no diplomatic relations or which is at war with nations of this hemisphere." The recommendation, while somewhat faulty in style, clearly bars Brazil, for example, from permitting the Argentine Embassy in Rio de Janeiro to represent the interests of Germany, Italy or Japan.³⁹

It was obviously a matter of continental solidarity that an American Republic, at war with a non-American State, should not be treated as a belligerent in respect to access to the ports of another American Republic or in general in respect to restrictions upon a belligerent imposed by the international obligations of neutrality. The anomalous status of "non-belligerency," which had already obtained a foothold in American international law, might be described as a modern application of the principle of "benevolent neutrality" recognized by Grotius. The Government of Uruguay had recognized such a status in 1917; and Argentina had revived the conception in May, 1940, at the time of the violation by Germany of the neutrality of Holland and Belgium.⁴⁰ Projects in respect to non-belligerency were presented by Ecuador (No. 30), Mexico (No. 50) and Uruguay (No. 60); those of Mexico and Uruguay extending the privileges of non-belligerency not only to American States involved in the present war, but to non-American States as well when the latter were at war with an American State. The Ecuadorian project defines the status of non-belligerency as follows:

No. 2. The declaration of non-belligerency made in the preceding article shall signify the maintenance of the normal relations of peace between the American Republics not taking part in the war and those

³⁹ The recommendation puts the burden of refusal upon the American State which has broken relations rather than upon the State which is requested by the non-American State to represent its interests and which in turn makes a request to be permitted to do so. Panama and Nicaragua argued in favor of the provisions of the project as presented. See *Diario*, Vol. I, No. 13, p. 7.

⁴⁰ See, on the subject on non-belligerency R. R. Wilson, "Non-belligerency in relation to the terminology of neutrality," this JOURNAL, Vol. 35 (1941), p. 121; and articles cited in note 6, above.

taking part in it, and, therefore, the maintenance of the reciprocal international rights and duties derived from that status, without prejudice to assistance and coöperation for defence, in conformity with inter-American agreements and bilateral and multilateral pacts between the American Republics.

The Mexican project referred to non-American States fighting on the side of the United States as being "virtually allies"; while the Uruguayan project referred to the fact that the security of inter-American navigation was being maintained by the combined fleets of American States and those of other continents. The subcommittee unified the three projects, making the definition of "non-belligerency" in the Ecuadorean project Article 3 of the resolution reported to the committee. Objection was taken, however, in full committee, to an unqualified extension of the status of non-belligerency to other than American States; with the result that the resolution as finally adopted (XXXVII) limits the obligation to "any American State which is now at war or may become involved in a state of war with another non-American State."⁴¹ In respect to the treatment of non-American states as non-belligerents, Article 2 of the resolution reads: "To recommend that special facilities be granted to those countries which, in the opinion of each Government, contribute to the defense of the interests of this hemisphere during this emergency." Article 2 thus makes it possible for states not maintaining diplomatic relations with Russia, or not being willing to concede special privileges to Russia, to refrain from doing so without open discrimination.⁴²

Although the Meeting of Foreign Ministers had been called primarily with the object of discussing practical measures to be taken for continental defense, it would have been out of harmony with other similar gatherings if expression had not been given to the strong emotions aroused by the conditions with which the American Republics were confronted. The Government of Ecuador felt that it was desirable to denounce specifically the aggression committed by Japan against the United States. An elaborate preamble to the project (No. 33) recited the circumstances under which the aggression was committed, and the principles of inter-American and general international law thus violated. The resolution, as adopted (XXIV), instead of "declaring" that Japan had violated the principles of international law, "makes it of record" that Japan had done so, thus avoiding a

⁴¹ The correct literal translation obviously being, "with another State, not American" (*"con otro Estado no Americano,"* the master text being in Spanish).

⁴² The omission of the elaborate preamble approved by the subcommittee was regarded by a number of the delegates as unfortunate. Doubtless those who were opposed to including Great Britain with the American States in the treatment as non-belligerents felt it necessary to eliminate references in the preamble that led up to its inclusion. The resolution was voted without discussion in the plenary session of the committee; the chairman, however, asking for a vote of thanks to the Government of Uruguay for initiating the idea of extending the privileges of non-belligerency to other than American States.

phrasing that might seem too obvious in the face of other action taken against Japan. At the same time the resolution extends the condemnation "to the Powers which have associated themselves with Japan."⁴³

In like manner the Government of Mexico introduced a project (No. 48) recognizing the "heroic struggle" of the nations conquered and temporarily occupied by the totalitarian Powers, and expressing "full sympathy and solidarity" with them and belief in the recovery of their independence. The Uruguayan delegate appears to have raised the question of the recognition of the governments in exile, and the project was modified by the subcommittee so as to include that point. The omission of France and Denmark from the list of nations recited in the preamble of the project was deliberate, inasmuch as they were collaborating with the aggressors;⁴⁴ so that when the full committee proceeded to adopt the project, in the form of a recommendation, without the original preamble, the Mexican delegate insisted upon a modification of the text.⁴⁵ The recommendation (XXXVIII) was then made to read: "That the Governments of the American Republics continue their relations with the Governments of those occupied countries which are fighting for their national sovereignty and are not collaborating with the aggressors, and express the fervent hope that they may recover their sovereignty and independence."

There remained for the first subcommittee of the First Committee the problem of coördinating the general staffs of the different countries in the interest of continental defense. A project introduced by the Dominican Republic (No. 16) called for the appointment of military and naval attachés "to serve as liaison officers between the General Staffs of the armies of the nations of the American continent." A similar project was presented by Chile (No. 80). Two other projects called for the creation of a Permanent Inter-American Defense Committee (Haiti, No. 44; Uruguay, No. 59). A Peruvian project (No. 77) called for "collective measures for the integral defense of the continent." The recommendation adopted (XXXIX), under the title "Inter-American Defense Board," calls for "the immediate meeting in Washington of a committee composed of military and naval technicians appointed by each of the Governments to study and to recommend to them the measures necessary for the defense of the continent."

To the second subcommittee of the First Committee were assigned five separate topics, each with its own sub-reporter to whom the projects bearing

⁴³ With this resolution must be associated a project presented by Bolivia (No. 10), entitled, "Affirmation of the traditional theory of law in face of a deliberate disregard of international justice and morality," in which, after an elaborate preamble on the place of law and justice in international relations, the American Republics reaffirm their faith in international law. The project was referred to the Inter-American Juridical Committee, by Agreement XXVIII.

⁴⁴ Albania and the Baltic States were apparently overlooked in the discussions.

⁴⁵ *Diario*, Vol. I, No. 13, p. 8. The omission of the preamble of the project reported by the committee suggests that here again, as in the case of the Atlantic Charter, some element of "continental isolationism" appears to have been in evidence, the basis for which does not appear in the record.

on the topic were assigned. The leading topic, although second in order of assignment, was the "Juridical Organization of the Continent." The chief problem under this head was the reorganization of the Inter-American Neutrality Committee, whose functions, prescribed by the First Meeting of Foreign Ministers at Panama in 1939, were obviously no longer in keeping with the changed conditions.⁴⁶ Several projects were before the subcommittee. The project presented by the United States (No. 25) proposed the creation of a new Inter-American Committee on Juridical and Post-War Problems, composed of 21 members, one to be named by each of the Governments, and given advisory functions in respect to the problems arising out of the war, disputes between American States when referred to the committee by agreement of the parties, and the question of judicial assistance and other related matters. The project presented by Ecuador (No. 31) left the existing organization of the committee unchanged, as did also the Uruguayan project (No. 59); while the Peruvian project (No. 77) for an "Inter-American Committee on Juridical Solidarity" raised the number of members to twelve. In spite of a desire on the part of a number of the delegations for a committee to which each State might name a member, the argument in favor of a strictly technical committee, sufficiently small in number to be able to work effectively, prevailed; and the subcommittee decided that no change should be made in the organization of the new committee. The resolution (XXVI) provides that "the Inter-American Neutrality Committee at present existing will continue to function in its present form under the name of 'Inter-American Juridical Committee,' will have its seat at Rio de Janeiro and may meet temporarily, if it deems it necessary, in other American capitals." It is provided, however, that the new committee may invite American jurists whom they consider to be specialists in particular subjects to take part in their deliberations; thus permitting the committee to enlarge its membership from time to time.⁴⁷

A wide variety of functions were assigned to the new Juridical Committee. It is called upon to study, "in accordance with experience and the development of events, the juridical problems created for the American Republics by the world war," as well as problems specifically submitted to it by resolutions of inter-American meetings of Foreign Ministers or of international conferences of American States. It is to continue its studies on contraband of war and on the project of a code of the principles and rules of neutrality; ⁴⁸ it is "to report on possible claims" arising from the requisition of immobilized

⁴⁶ For a survey of the functions of the Neutrality Committee, see C. G. Fenwick, "The Inter-American Neutrality Committee," this JOURNAL, Vol. 35 (1941), p. 12.

⁴⁷ The committee is also authorized, in exceptional cases, to have recourse to the services of technical experts when considered indispensable for the most efficient performance of its duties. The resolution also provides that the members "will have no other duties than those pertaining to the committee," thus excluding the appointment of members of the diplomatic service resident in Rio de Janeiro.

⁴⁸ The first thirty articles of the Draft Code of Neutrality had already been forwarded to the Pan American Union before the United States was at war.

merchant ships and from unlawful acts of the belligerents;⁴⁹ and it is "to develop and coördinate the work of codifying international law." In respect to this last task it was provided that the work should be "without prejudice to the duties entrusted to other existing organizations." The question of the reorganization of the work of codifying international law was not on the agenda of the meeting; and in view of the complicated character of the machinery of codification, it remains to be seen whether the committee can succeed in coördinating in any degree the activities of the existing organizations and in thus pushing forward the work which, in consequence of divided responsibility, has not been effectively prosecuted.⁵⁰

The functions of the Juridical Committee were further extended by a resolution coming under the first topic assigned to the committee—that of "Post-War Problems." Projects introduced by a number of the delegations made it clear that their Governments were seriously concerned with the problem of rebuilding a world of law and order at the close of the war. In his address at the opening session of the meeting, Under Secretary of State Welles had emphasized the need of unity in order that the American Republics "may prove to be the potent factor which they should be of right in the determination of the nature of the world of the future, after the victory is won;" and he went on to quote President Wilson's ideal of "a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free."⁵¹ In the project (No. 25) presented by the United States for the reorganization of the Neutrality Committee the functions assigned to the Juridical Committee were sufficiently broad to have warranted the study of problems arising after the war as well as during it. The Peruvian project (No. 77) was more specific, calling upon its proposed Inter-American Committee on Juridical Solidarity "to prepare a plan for the reconstruction of international life at the termination of the war and to propose the measures which should be taken to carry out this plan." The Colombian project (No. 19), after setting forth the basis of a "new order of peace," called upon the Neutrality Committee to

⁴⁹ In spite of the clear language of the text, Peru entered a reservation to this function of the committee, stating that: "Peru votes in favor of this project, with the reservation that, in accordance with the express purpose of this meeting, the enemy State referred to in paragraph 'c' must be a non-American State. Furthermore, it places on record the fact that the Third Meeting of Ministers of Foreign Affairs gave it this true interpretation." Compare the reservation entered by Peru to Declaration XXI, above p. 179.

⁵⁰ The work of codifying international law, as provided for in successive resolutions of inter-American conferences, is distributed among numerous bodies: the National Committees, appointed by the separate governments; the Permanent Committees (of Rio de Janeiro, for Public International Law; of Montevideo, for Private International Law; and of Havana, for Comparative Law and Unification of Legislation); the Committee of Experts; and the Inter-American Conference of Jurists.

See *Agencies for the Codification of International Law*, Third Edition, Pan American Union, 1940.

⁵¹ For the text of the address, see *Department of State Bulletin*, *ibid.*

the Tripartite Pact, including territories subject to them; the establishment of controls over all message traffic by means of the licencing of facilities; the prevention of the "transmission and reception of information, public or private, which might directly or indirectly promote the purposes of the members of the Tripartite Pact, or of governments subservient to them"; and the elimination of clandestine radio stations.⁵⁶ The resolution adopted (XL) substituted "aggressor States" for "members of the Tripartite Pact"; adopted the licencing system; recommended measures to eliminate clandestine stations; but rejected the drastic provisions for control over "information." Even as thus amended the Chilean delegate accepted the resolution subject to its conformity to the Chilean Constitution.⁵⁷ Three other projects (Nos. 14, 54 and 78) dealing with the improvement of the Inter-American system of communications were approved by the subcommittee, but were merged in a more elaborate resolution (IV) reported out from the Second Committee.

Bearing only remotely upon the defense of the hemisphere but included under it for want of another heading on the program were four other topics upon which there was no difference of opinion. Projects were presented by Venezuela (No. 5) and by the United States (No. 27) relating to the Red Cross; and a resolution was adopted (XXIX) reciting the need of developing Red Cross work by means of national societies and referring to the declaration made at the Havana meeting in 1940 in favor of an Inter-American League of National Red Cross Societies and recommending action in both respects.⁵⁸ A project dealing with the "Improvement of Health and Sanitary Conditions," presented by the United States, was adopted (XXX) without modification. The Mexican delegation felt that the time was appropriate to get rid of the disgrace of the French penal colony off the coast of French Guiana; and a project (No. 49) was introduced expressing the desire on the part of the American Republics "that penal colonies of non-American States no longer continue to exist in America, since they are considered contrary to the ideal of American liberty." The resolution, as adopted (XXXII), calls upon the Governing Board of the Pan American Union "to approach those States" which possess territories in America used as penal colonies in order to eliminate the future use of such territory for that purpose. Lastly, a resolution based upon a project introduced by the Chilean delega-

⁵⁶ So drastic were the provisions that the United States itself could not have accepted them if it had not been at war. Brazil asked for changes due to the fact that it had already passed domestic legislation on the subject.

⁵⁷ No formal reservation was made; merely a statement in the record.

⁵⁸ The last article (4) of the resolution, not appearing in either project, is reminiscent of the sharp controversies among the women's groups at Buenos Aires in 1936 and at Lima in 1938. It provides, "That, when they [Governments of the American Republics] deem it desirable, they consider whether the services rendered by women to the Red Cross in times of peace or war can be given equal weight within the framework of their respective domestic legislation to those of a military nature rendered by men."

tion (No. 81) was adopted (XXXIII), reaffirming the principles contained in the Panama Resolution on the Humanization of War and condemning specifically "the practice of holding prisoners as hostages and taking reprisals on them as contrary to the principles of law and the humanitarian sentiments which States must observe during the course of hostilities."⁵⁹

While not appearing on the program and not given any official recognition in the *Diario* of the proceedings, the settlement of the boundary dispute between Ecuador and Peru must be assigned an important place among the political accomplishments of the meeting. The controversy was of long standing, having its origin in the uncertain boundaries of the two States at the time of their independence. It involved title to some 45,000 square miles of land running roughly from the undisputed eastern boundary of Ecuador back, in the shape of a wedge, to the lowlands leading to the Amazon basin. Numerous efforts had been made to settle the controversy by peaceful procedure, the most important of which was a reference of the dispute to the arbitration of the King of Spain in 1887. Taking into account the lapse of time and the fact that the territory in dispute had been occupied by Peruvian settlers, Peru had been claiming of recent years that the question was no longer an international one, but merely one of determining boundaries between areas whose sovereignty was already determined by the nationality of the inhabitants.⁶⁰ Ecuador maintained that the mere passage of time could not close the issue, inasmuch as it had been agreed as late as 1924, and again in 1936, that delegates were to meet in Washington, and that if a definite line could not be fixed by them the controversy was to be submitted to the arbitration of the President of the United States.⁶¹

Hostilities broke out in July, 1941, and Peru occupied the Ecuadorean province of El Oro as security. Argentina, Brazil and the United States offered their services as mediators, and hostilities were brought to an end, without, however, the evacuation by Peru of the occupied territory. At the

⁵⁹ During the discussions in subcommittee a telegram was received from General Sikorski, President of the Interallied Conference for the Repression of War Crimes, setting forth the declaration drawn up in London on Jan. 13, 1942, in which the governments of the occupied countries pledged themselves to try before a special tribunal those guilty of war crimes. See *Diario*, Vol. I, No. 7, p. 17.

⁶⁰ The legal points at issue were highly complicated, involving the rule of *uti possidetis*, the question of succession to treaties, the effect of war upon treaties, prescription and self-determination. See "The Ecuador-Peru Boundary Controversy," by L. H. Woolsey, this JOURNAL, Vol. 31 (1937), p. 97. Professor Ulloa of Peru is of the opinion that the principle of self-determination was continuously asserted during the whole course of the controversy. See "*El principio de la Libre Determinación de los pueblos en la Historia Internacional del Perú*," *Revista Peruana de Derecho Internacional*, Tomo I (1941), No. 1, p. 43. For a brief bibliography of the controversy, see Pastoriza Flores, *History of the Boundary between Ecuador and Peru*, doctoral dissertation, Columbia University, New York, 1921, pp. 83-89.

⁶¹ The most recent summary of Ecuador's position is to be found in *Dictámenes Jurídicos acerca del problema ecuatoriano-peruano dados por ilustres internacionalistas americanos*. Quito, Imprenta del Ministerio de Gobierno, 1942.

opening of the meeting at Rio de Janeiro, Ecuador took the position that it could not join in any action for continental defense unless the American Republics were willing to set their own house in order by bringing pressure upon Peru to effect a settlement. Negotiations were carried on by the mediators, Chile now being included in the group, during the sessions of the meeting; with the result that it was possible for Sr. Aranha to announce at the closing session of the meeting that an agreement had been reached at last.⁶²

Such, reverting to the formal program of the meeting, were the resolutions and recommendations coming from the First Committee entrusted with the "Protection of the Western Hemisphere."⁶³ There remained for the consideration of the Ministers the report of the Second Committee dealing with the second section of the program, "Economic Solidarity." This committee had as its chairman Sr. Padilla of Mexico and as reporter Sr. Dasso of Peru. Its work, involving some 37 projects presented by various delegations, was divided among five subcommittees, each organized with its chairman and reporter. The first subcommittee, with Sr. Davila of Mexico as chairman and Sr. Soto del Corral of Colombia as reporter, dealing with the control of exports in order to conserve basic and strategic materials and with the control of alien financial and commercial activities prejudicial to the welfare of the American Republics,⁶⁴ had before it projects presented by Bolivia (No. 13), Cuba (No. 15), Mexico (No. 45) and Peru (Nos. 68, 69, 72). These projects recognized in common that the severance of financial and commercial relations, upon which all of them were in agreement, would entail serious dislocations of the domestic economy of a number of countries; and that it would be necessary to establish a system of banking credits and other business arrangements to replace the suppressed activities of citizens of the Axis Powers. Two recommendations resulted from the coördination of these projects. The first (V), after reciting the various ways in which the American Republics had already restricted and controlled transactions with the Powers of the Tripartite Pact, calls for the immediate adoption of "any additional measures necessary to cut off for the duration of the present hemispheric emergency all commercial and financial intercourse, direct or indirect, between the Western Hemisphere and the nations signatory to the

⁶² *Diario*, Vol. I, No. 15, p. 14. The announcement was somewhat premature, and it must be interpreted as an expression of what the President of the meeting felt was an accomplished fact even if the agreement had not been reduced to legal form. The agreement was actually signed at 2:00 o'clock the following morning.

For the text of the agreement, see *Department of State Bulletin*, Feb. 28, 1942, Vol. VI, p. 195.

⁶³ At the close of his report, the chairman of the committee, Sr. Turbay, gave a résumé of the work, listing the "fundamental principles" and "postulates" which, when accepted by the meeting, would become new sources of American international law. *Diario*, Vol. I, No. 13, p. 10.

⁶⁴ These were the first and fifth items under Section II of the program.

Tripartite Pact and the territories dominated by them." Comprehensive as is this program, the recommendation proceeds to enumerate measures "to eliminate all other financial and commercial activities prejudicial to the welfare and security of the American Republics"—such as transactions entered into "by or for the benefit of the members of the Tripartite Pact . . . as well as the nationals of any of them, whether real [natural] or juridical persons," the activities of natural persons, nationals of the Powers of the Tripartite Pact, being excepted if kept under close supervision to prevent transactions "of whatsoever nature which are inimical to the security of the Western Hemisphere." As to property of the Powers of the Tripartite Pact and their nationals, the recommendation recognizes that, whenever a government of an American Republic may consider it necessary, "the properties, interests, and enterprises of such States and nationals which exist within its jurisdiction, may be placed in trust or subjected to permanent administrative intervention for purposes of control." Sales may be made by an American Government to its nationals under similar conditions of trusteeship. Coöperation is pledged in regard to the measures which might be taken to counteract any adverse effects, such as unemployment, that might result from the application of the measures of control contemplated.⁶⁵

Supplementing this resolution was a second one (VI) calling for a conference of representatives of the central banks of the American Republics "for the purpose of drafting standards of procedure for the uniform handling of bank credits, collections, contracts of lease and consignments of merchandise, involving real [natural] or juridical persons who are nationals of a State which has committed an act of aggression against the American Continent."

To the second subcommittee, with Sr. Souza Costa of Brazil as chairman and Sr. Llosa of Peru as reporter, was assigned the problem of "Arrange-

⁶⁵ Reservations were entered to this recommendation by Argentina and by Chile. "The Argentine delegation requests that it be recorded in the minutes, as well as at the end of this draft resolution, that the Argentine Republic agrees with the necessity of adopting economic and financial control measures with regard to all foreign and domestic activities of firms or enterprises which may, in one way or another, affect the welfare of the republics of America or the solidarity or defense of the continent. It has adopted and is prepared to adopt further measures in this respect, in accordance with the present resolution, extending them, however, to firms or enterprises managed or controlled by aliens or from foreign belligerent countries not in the American continent." The minutes of the sessions of the Second Committee on Jan. 19 and 20 (*Diario*, No. 10, pp. 8, 10), make it clear that Argentina was seeking to avoid any commitment which would force it to make a distinction between the belligerents.

The Chilean reservation read: "The Minister of Foreign Affairs of Chile gives his approval to these agreements in so far as they do not conflict with the provisions of the Political Constitution of Chile, declaring further that such agreements will only be valid, with respect to his country, when approved by the National Congress and ratified by its constitutional agencies." The reservation would appear to be technically superfluous in view of the fact that the "agreement" was only in the form of a recommendation, and referred to measures to be adopted "in a manner consistent with the usual practices and the legislation of the respective countries." The views of the Chilean delegation were further expressed in the minutes of the subcommittee on Jan. 20. *Diario*, No. 10, p. 9.

ments for the increased production of strategic materials." Projects had been presented by Venezuela (No. 3), Ecuador (No. 41), Mexico (Nos. 45, 46) and Peru (No. 67), all of which were approved, with the exception of that of Ecuador which called for joint sessions of the Governing Board of the Pan American Union and the Inter-American Financial and Economic Advisory Committee to study emergency problems, and which was referred to the fifth subcommittee and later withdrawn. The recommendation (II) embodying these projects is an elaborate one. After a lengthy preamble reciting the necessity of the "economic mobilization" of the American Republics with the object of "guaranteeing the supply of strategic and basic materials necessary to the defense of the hemisphere,"⁶⁶ the recommendation calls for a wide variety of measures to stimulate production, to eliminate administrative formalities and restrictions which impede the free flow of strategic materials, to prevent an increase in the export prices of these basic materials and at the same time to assure prices "which are equitable for the consumer, remunerative to the producer and which provide a fair standard of wages for the workers of the Americas, in which producers are protected against competition from products originating in areas where real wages are unduly low." The service of the financial obligations incurred by these measures is to be made, as far as possible, conditional upon the proceeds of the exports from each country. In order to make these measures effective, each country is to organize a special committee to formulate national plans for economic mobilization, which are to be sent to the Inter-American Financial and Economic Advisory Committee. The last item of the document is in the form of a resolution, based upon an Ecuadorean project (No. 39), that the "means of operation" of the Financial and Economic Advisory Committee be expanded and that it be empowered "to request the American Governments to execute the inter-American economic agreements which they have previously approved."⁶⁷

Closely connected with the problem of stimulating production was that of making "arrangements for furnishing to each country the imports essential to the maintenance of its domestic economy," forming item 3 of the second section of the program. This task fell to the third subcommittee, with Sr. Hernandez of Venezuela as chairman and Sr. Guachalla of Bolivia as reporter. The subcommittee had before it projects from eight different delegations, those of Venezuela (No. 3), Cuba (No. 15), Dominican Republic (No. 17), Ecuador (Nos. 34, 40), Chile (No. 56), Uruguay (No. 61), Nicaragua (No. 64), and Colombia (No. 74). An elaborate resolution (III) re-

⁶⁶ The point was brought out in the discussions in subcommittee that the definition of "strategic materials" was limited by the United States to those necessary for the prosecution of the war, whereas the other American countries included in the term materials needed for civilian industries. See *Diario*, Vol. I, No. 7, p. 15.

⁶⁷ For the text of the document, see this JOURNAL, Supplement, p. 63. The passage of the document from recommendation to resolution was doubtless due to the fact that new powers were being given to the Financial and Economic Advisory Committee.

sulted, covering the wide field of the stability of currencies, commercial credits, price-fixing, priorities and licencing. Production was to be increased, but without endangering the security of the exporting nation; equal access was to be given to American nations to inter-American commerce and to raw materials, provided, however, that "preferential treatment" might be given to the nations at war "for equal access to materials essential to their defense"; "adequate, ample, liberal and effective systems of credit" were to be established to facilitate the acquisition of products required; prices were to be "harmonized" by preventing sharp increases both for exports and for imports; maximum prices fixed by a particular country were to be submitted to consultation, if advisable; and an effort was to be made to establish a "fair relation between the prices of foodstuffs, raw materials and manufactured articles." In addition, administrative systems for the control of exports were to be simplified and made more efficient; a system of allocation was to be adopted for articles subject to priorities and licences, and representatives were to be appointed in the capitals of the importing countries to coöperate in accelerating the interchange of such articles; and statistics were to be exchanged with respect to consumer needs and the production corresponding to them.⁶⁸

The fourth item on the program, "the maintenance of adequate shipping facilities," went to the fourth subcommittee, organized with Sr. Salazar Gomez of Ecuador as chairman and Sr. Garcia of Chile as reporter. The problem was a serious one for a number of States, and as many as nine projects were presented to meet it, Venezuela (No. 4), El Salvador (No. 7), Bolivia (Nos. 11, 14), Cuba (No. 15), Ecuador (No. 37), Mexico (No. 45), Chile (No. 54), and Peru (No. 71) contributing proposals which were brought

⁶⁸ The minutes of the discussions in the third subcommittee go into greater detail than those of other subcommittees and give a good indication of the divergent points of view. See *Diario*, Vol. I, No. 10, p. 11 ff.; No. 11, p. 9 ff. Many American States, cut off from their normal imports from Europe, were in a difficult position. The opening address of Under Secretary Welles was quoted at length as indicating the recognition by the United States of "the important rôle which imported materials and articles play in the maintenance of the economies of your nations," and that the United States "was making every effort consistent with the defense program to maintain a flow to the other American Republics of materials to satisfy the minimum essential import requirements of your economies"—the further assurance being given that the United States would provide for the "essential civilian needs" of the American States "on the basis of equal and proportionate consideration with our own."

The American delegate on the subcommittee explained the functions of the Board of Economic Warfare and of the Office of Price Administration. A number of delegates were concerned lest their own needs of raw materials might be overlooked in the satisfaction of the war needs of the United States, for which preferential contracts had been made. The problem of maintaining a parity between the prices of exported raw materials and of imported finished goods was discussed at length. Different standards of living had to be taken into account; and countries exporting raw materials were naturally desirous of obtaining prices which would put them in a more favorable position as buyers of consumers' goods. If the resolution was evasive on a number of points, it was so of necessity.

together by the subcommittee into a single resolution (IV) under the title, "Mobilization of Transportation Facilities." The resolution recommends the expansion and improvement of "communications systems of importance to continental defense and to the development of commerce between the American nations" by the coördination of internal communication systems with inter-American facilities, by measures to insure the allocation of available shipping tonnage to the import and export of products essential to national economies, by reduction of port charges and the expansion of port facilities and airports, and by completion of the unfinished sections of the Pan American Highway. Further, the resolution recommends that the Inter-American Financial and Economic Advisory Committee and the Inter-American Maritime Technical Commission study the problem of inter-American maritime transportation with a view to coördinating and developing existing facilities so as to link together, "by regular and adequate services," the principal import and export markets.⁶⁹

To the fifth subcommittee, with Sr. Rojas of Bolivia as chairman and Sr. Garcia of Chile as reporter, were assigned a number of problems not lending themselves to classification under a single heading.⁷⁰ El Salvador (No. 8) proposed that the American Governments study the question whether in negotiating commercial agreements with nations outside the Western Hemisphere an exception should not be entered to the most-favored-nation clause so as to exclude from its operation the treatment accorded by American States to one another; and a resolution (VII) was adopted to that effect, under the title, "Development of Commercial Interchange."⁷¹ A Bolivian

⁶⁹ The resolution closes with the recommendation that the Inter-American Financial and Economic Advisory Committee and the Inter-American Maritime Technical Commission "examine the desirability of applying the 'cash and carry system' to the transportation of commodities." But no light is thrown upon the matter in the reported discussions of the subcommittee. The Peruvian project (No. 71) recommended "that the desirability be examined of applying the system of insurance and freight for the account of the purchaser for products which may be seriously affected by the shortage and disorganization of maritime transportation." But that is far from the "cash and carry system."

⁷⁰ This was but another way of giving a somewhat broader interpretation of the program, which, according to the regulations, could not be enlarged without first obtaining unanimous consent. *Diario*, Vol. I, No. 4, p. 2.

⁷¹ The United States entered a reservation to this resolution, as well as to Resolution XIV on Commercial Facilities for the Inland Countries of the Americas, as follows:

"The Government of the United States of America desires to have recorded in the Final Act its reservation to Resolution VII (Development of Commercial Interchange) and Resolution XIV (Commercial Facilities for the Inland Countries of the Americas), since the terms of these resolutions are inconsistent with the traditional policy of liberal principles of international trade maintained by the United States of America and as enunciated and reaffirmed at the recent International Conferences of American States and the First and Second Meetings of the Ministers of Foreign Affairs of the American Republics."

The discussions in subcommittee (*Diario*, No. 9, p. 15) indicate an interesting difference of opinion between delegations, such as that of El Salvador, seeking to develop a more highly integrated system of inter-American commerce, and those, designated as "internationalists" by the Brazilian delegate, who looked to the restoration of normal world trade after the war.

project (No. 9) looking to the encouragement and support of the work of the Inter-American Development Commission and of the national commissions associated with it was adopted (VIII), with an addition calling for the creation of a permanent body of technical experts to study the natural resources of each country when so requested by its government. With this resolution must be associated a declaration (XIII) on the "Utilization of Raw Materials," based upon a project (No. 55) introduced by Chile, proclaiming it to be the "economic policy" of the American Republics to raise the standard of living of their peoples by a broad utilization of their natural resources and a greater degree of industrialization when the raw materials can be so used effectively. Another Bolivian project (No. 11) proposing coöperation between the economically stronger and the weaker nations as a fundamental principle of American solidarity was adopted in modified form as a declaration (XVI) on "Economic Collaboration," which also expressed the aims of projects introduced by Cuba (No. 15) and by Chile (No. 55). Paraguay (project No. 66) and Bolivia (project No. 11) were both concerned to secure an understanding from other States of the hemisphere not to demand for themselves concessions and facilities granted to the "inland" countries of America; and a recommendation (XIV) was adopted to that effect.⁷² The United States, seeking to promote the stability of foreign exchange rates within the Western Hemisphere, introduced a project (No. 75) recommending that a special conference of Ministers of Finance be called for the purpose of considering the establishment of an international stabilization fund; and this was accepted without change (XV).⁷³ Ecuador introduced a project (No. 35) calling upon the Inter-American Financial and Economic Advisory Committee to take steps to encourage capital investments by any of the

⁷² The "inland" countries appear as "*países mediterráneos*" in Spanish, "*países centrais*" in Portuguese. Emphasis was put upon their geographical situation as entitling them to special privileges which could not readily be extended to other countries. The United States delegate voted against the proposal in subcommittee (*Diario*, No. 11, p. 21); and a formal reservation was entered in the Final Act. See above, note 71. Apparently the position taken was that, while war-time agreements of a restrictive character might be made, the general principle of most-favored-nation treatment must be maintained in post-war commerce.

⁷³ The preamble of the recommendation recites the advantages of "a more effective mobilization and utilization of foreign exchange resources," and the fact that the American Republics "which are combined in a common effort to maintain their political and economic independence can coöperate in the creation of an organization to promote stability of foreign exchange rates, encourage the international movement of productive capital, facilitate the reduction of artificial and discriminatory barriers to the movement of goods, assist in the correction of the maldistribution of gold, strengthen monetary systems, and facilitate the maintenance of monetary policies that avoid serious inflation or deflation."

The Venezuelan assessor pointed out that the larger part of the functions of the proposed stabilization fund had already been attributed to the Inter-American Bank. The fact that the bank was not yet functioning led to the adoption of a recommendation (X) calling upon the governments which had not already adhered to the Convention for the Establishment of an Inter-American Bank to come to a decision as soon as possible.

American Republics in any of the others; and this also was accepted without change (XI).⁷⁴

Chile (No. 56) was interested, as was also Bolivia (No. 12), not only in the export of its two chief commodities, nitrates and copper, and in securing a fair balance between the prices of its exports and the prices of its imports, but in preventing the artificial stimulation of industries "for the production of synthetic products which may displace natural products available in other American countries," its project going so far as to provide that "if, due to the extraordinary conditions resulting from the war, additional industrial plants have been established, these should only be operated temporarily while the conflict demands it." This would not only have called for serious sacrifices in behalf of "economic solidarity," but would have created rigid obligations in respect to uncertain future conditions. The resolution adopted (IX), under the title "Development of Basic Production," does not go the full length of the Chilean proposal; but it does go so far as to provide, "that the nations of the Americas stimulate the development of the basic production of each of them, avoiding in so far as possible the establishment or expansion of production of substitute or synthetic commodities which is economically artificial and might displace the consumption of natural products available in other American nations, there being excepted only those industries which are indispensable for national defense provided that such defense needs cannot be effectively met with natural products." In spite of the loophole offered by the phrase "indispensable for national defense provided that . . .," the obligation is still one that may entail serious readjustments of emergency industries at the close of the war.⁷⁵

In response to a Chilean project (No. 52), a resolution (XII) was adopted requesting the American Governments "to participate in and support" the Inter-American Statistical Institute of Washington and recommending that the Pan American Union organize periodic meetings of representatives of the national statistical services for the coördination of their work.

Such was the wide range of subjects covered by the meeting, which had less than ten days within which to reach its conclusions and scarcely more than half that time for the actual work of the committees and subcommittees.⁷⁶ That there should have been considerable difficulty in avoiding

⁷⁴ Notable advances in inter-American legal as well as economic relationships may develop if that part of the recommendation which requests the various governments to adopt the measures necessary to facilitate the "protection" as well as the flow of such investments should be put into effect. Thus far little progress has been made in the codification of the law of foreign investments.

⁷⁵ The objections to the assumption of rigid obligations in respect to the manufacture of synthetic products were pointed out by one of the Brazilian assessors, who stated that the position taken by Brazil was the same as that taken by the delegate of the United States. *Diario*, No. 9, p. 16.

⁷⁶ The distribution of the projects was not completed until the fourth day, and it was expected that the committees would complete their work by the ninth day, in advance of which the subcommittees had to present their reports.

duplication in the terms of the agreements reached was to be expected; and it is to the credit of the subcommittees and the sub-reporters that by intense work, day and night, they were able to bring order out of disorder. Apart from the general tendency of regular inter-American conferences to indulge in broad generalizations and vague abstractions, the limitations of time imposed by the shorter meetings of Foreign Ministers made it all the more necessary to avoid too specific commitments upon subjects so numerous as to prevent careful examination.⁷⁷ The geographical distribution of office space, as well as the limitations of time, made it difficult to bring the work of one subcommittee into harmony with another. But doubtless the most serious obstacle to efficient technical handling of the problems before the meeting was the practice, taken over from the regular inter-American conferences, of having each State introduce "projects" expressing its own conception of the manner in which the particular topic on the program might be most efficiently met. These projects, as already pointed out, were no less than 81 in number; and while many of them were valuable contributions towards a solution of the problems with which they dealt, they presented two serious difficulties: first, that of their proper distribution between the two main committees and among the numerous subcommittees, and secondly, that of their reconciliation *inter se*. It was, of course, impossible for the regulations under which the meeting operated to require that projects be presented to the governments in advance. Yet only by a careful study in advance could they have been harmonized with one another, could duplications have been avoided, and, most important of all, could a more specific character have been given to the conclusions reached.⁷⁸

The Meetings of Foreign Ministers have already come to play a far more important rôle in the organization of inter-American relations than could have been foreseen for them at the time of the Lima Conference. It would seem desirable, therefore, that consideration be given to certain changes in the regulations which may enable the meetings to operate more effectively.⁷⁹ A number of the delegates commented upon the desirability of keeping the plenary sessions of the committees, as well as the sessions of the subcommittees, confidential and informal gatherings.⁸⁰ In its general or-

⁷⁷ Illustrations of the effect of the pressure of time may be found in the decisions taken on the Atlantic Charter, the status of non-belligerency, and relations with the governments of occupied countries.

⁷⁸ The projects which were adopted practically without change by the subcommittees were not necessarily those which were intrinsically better in substance or in form, but rather those which dealt with a single topic of a non-controversial character.

The project presented by El Salvador (No. 6) calling for the coördination of the resolutions, declarations and other acts of previous consultative meetings, which was forwarded to the Juridical Committee for study, should do much to correct the present confusion.

⁷⁹ Resolution XXXIV, entitled "Regulations of the Meetings of the Ministers of Foreign Affairs of the American Republics" proposes amendments on minor points only.

⁸⁰ While the subcommittee meetings were confidential, their discussions appear in the *Diario* in more or less abridged form. Unfortunately, the abridged form gives at times an inadequate impression of the position taken by a particular delegate.

ganization, as has been seen, the meeting at Rio de Janeiro differed little from a regular inter-American conference. The real work was done in subcommittees, where only a smaller number of delegates could meet; while the sessions of the committees, upon which all of the delegations were represented, took on a more or less perfunctory character, as if their chief function was to ratify the agreements reached in subcommittee and to permit individual delegates to go on record in respect to the particular attitudes or policies of their governments.⁸¹ Due to the pressure of time it became practically impossible for the chairmen of the full committees to elicit discussion from the individual delegates upon controversial points or other matters requiring elaboration. This was particularly unfortunate in respect to some of the problems before the First Committee, where more general discussion would have prevented the feeling, to which certain delegates gave informal expression, that the form in which certain of the documents were drafted did not represent adequately the sense of the meeting.

It is a matter for consideration whether, even with as comprehensive a program as that presented at this latest meeting, it might not be possible to reverse the order followed at Panama, Havana and Rio de Janeiro, so as first to discuss matters in confidential plenary sessions and then to appoint committees to draft in proper form the conclusions reached. The elimination of projects presented in advance of the discussions need not mean that the suggestions of certain delegations would be overlooked. It would merely mean that collective decisions could be reached without the necessity of using the phrasing given to proposals by the particular countries presenting them. More time would be required for reaching decisions in plenary session, but equal time would doubtless be saved by the simplification of the program and its restriction to fewer issues. Ten days would appear to be too short a time for conference procedure; but not too short for direct and intimate conversations upon urgent questions of policy. Most important of all, the principle of the equality of states, which is basic in the organization of the American Republics, could be maintained more effectively.⁸² Votes taken in plenary session should always be free from the remotest suggestion of pressure, even the pressure of knowing that to express an opinion is to hold up the session and to delay adjournment for another day.

Conceding, however, certain defects in the organization and procedure of the meeting at Rio de Janeiro, what conclusions are to be reached with respect to the general character of the decisions recorded in the Final Act? No one who has studied the record of inter-American relations during the

⁸¹ The sessions of the committees are reported in full in the *Diario*, as well as the plenary sessions of the meeting itself.

⁸² The history of recent meetings and conferences shows clearly that the smaller States—the stars of lesser magnitude in what the Mexican delegate called the continental firmament, have no desire to press the principle of equality to the point of overlooking the practical realities of the political and economic situation before them. But they regard the principle itself as sacred; and the procedure of free consent should be strictly observed.

past ten years would deny that, in spite of the generalizations in which many of the resolutions, recommendations and declarations are phrased, and in spite of the lack of logical coherence in their formulation, the decisions taken at the meeting represent a marked advance in the political unity of the American States. The almost mystical meaning which the words "continental solidarity" have come to acquire is not to be dismissed as mere rhetoric. Step by step, from Buenos Aires in 1936 to Rio de Janeiro in 1942, they have been given clearer definition and more specific application to concrete situations. As strictly legal obligations, the terms of the several agreements constituting continental solidarity are clearly far short of binding commitments of regional collective security, in the sense that they do not provide for concrete ways and means in the event of the occurrence of specified situations. The obligations are still general in character, leaving it to be determined by the procedure of common consultation whether a majority may take action in common, and permitting the minority to hold aloof completely or to coöperate in defensive measures to the extent to which each State may individually find it convenient to do so. Obviously the success of such a loose system is dependent, apart from the good will of its members, upon the creation of more effective machinery of coöperation than the formal inter-American conferences and the occasional meetings of Foreign Ministers. This machinery appears to be developing in the form of committees, both permanent and temporary, entrusted with the formulation of plans and with the administration of specific functions.³³ It is sometimes said that the inter-American regional organization is seriously handicapped by the lack of balance in the system due to the preponderant economic and military power of the United States. This fact, which necessarily underlies all practical measures of economic and political coöperation, constitutes, indeed, a most serious obligation on the part of the United States to assume a responsibility commensurate with its power. But it need not prove an obstacle to continental solidarity so long as the United States can succeed in holding the confidence of the other American States in the integrity of its intention to observe scrupulously the legal principles upon which continental solidarity is based.

A number of the projects presented at the meeting at Rio de Janeiro make it clear that thought was being given to the relation of the inter-American regional system to the organization which must be created at the close of the

³³ Plans for remodeling the formal conferences and for creating a closer union of the American Republics have had considerable support of recent years. At the Inter-American Conference for the Maintenance of Peace, held at Buenos Aires in 1936, the delegations of Colombia and the Dominican Republic had introduced a project on the Creation of a League of American Nations. The project was referred (Resolution X) to the Lima Conference of 1938, where, upon a statement that the two delegations "preferred to wait until sentiment had more definitely crystallized," the project was referred to the consideration of the International Conference of American Jurists, whose report was to be considered at the Ninth International Conference, to be held at Bogota in 1943.

war for the maintenance of the general peace. For the time being the League of Nations was but one more government in exile. But though the doors of the building at Geneva were closed and the members of the League were engaged in a struggle for their very survival as independent States, the loyalty of many of the American States to the principles of the League remained unshaken. Many of the delegates at Rio de Janeiro had held high office under the League, and they were convinced that, however close the political and economic ties that might be developed between the States of the Western Hemisphere, it would still be necessary to correlate the inter-American regional system with the larger world-wide organization, in whatever form this might be constituted. The "universality of peace" is a phrase constantly in use by Latin-American jurists who have been associated with Geneva; and it was with marked expressions of approval that a number of the delegates at Rio de Janeiro heard Under Secretary of State Welles refer to the principles of Woodrow Wilson in his address at the opening session of the meeting. So significant a change of policy on the part of the United States could not pass without comment.⁸⁴ Already the terms of the Atlantic Charter had indicated that the United States was now prepared to make good the mistakes of the years succeeding 1920. Here was further proof of it. If any of the delegates, remembering the strictly continental policy of the United States at Buenos Aires in 1936 and at Lima in 1938, had doubts as to the coöperation of the United States in the organization of a new and stronger association of nations at the close of the war, none were expressed. The problem was less urgent than that of organizing the Western Hemisphere to meet the immediate danger confronting it; but for all that, the new policy proclaimed by the United States could not but encourage those who felt that the peace of the world could only be made secure by extending to all nations the principles proclaimed at Rio de Janeiro.⁸⁵

But if the meeting at Rio de Janeiro marked progress in the direction of the political unity of the Western Hemisphere, it also marked progress in respect to economic coöperation.⁸⁶ It was at the conference of Montevideo in 1933

⁸⁴ Compare the attitude of the United States at the Conference at Buenos Aires in 1936, when the principle of equal treatment of belligerents, in accordance with its domestic neutrality legislation of that year, was proposed. In signing the Convention to Coördinate, Extend and Assure the Fulfillment of the Existing Treaties between the American States, Argentina and Paraguay, and particularly Colombia, entered reservations permitting them to make a distinction between an aggressor State and the State attacked. "The Inter-American Conference for the Maintenance of Peace," this JOURNAL, Vol. 31 (1937), p. 201.

⁸⁵ In his address at the opening session, Under Secretary Welles referred to the American nations as "Trustees for Christian civilization" and spoke of the part they must play in the post-war world:

"When peace is restored it is to the interest of the whole world that the American Republics present a united front and be able to speak and act with the moral authority to which, by reason of their own enlightened standards, as much as by reason of their number and their power, they are entitled."

⁸⁶ At the plenary session of Jan. 27 the Argentine Minister put chief emphasis upon economic solidarity, observing that "close coördination of economic interests is the firmest

that the American States first came to be conscious of the necessity of developing an "inter-American commercial policy"; and this new field of coöperation was greatly extended at Buenos Aires and at Lima. At the Panama meeting the step was taken of creating the Inter-American Financial and Economic Advisory Committee, which has since proved to be so important an agency in meeting the financial and economic problems arising out of the war. The meeting at Havana enlarged the competence of the committee and pointed out new ways in which its work might be made more effective. The meeting at Rio de Janeiro, confronted with the necessity of giving "all-out" aid to the United States under a war program expanded beyond all anticipation, did not hesitate to discuss such far-reaching developments as complete freedom of trade between the American States, a common continental currency, uniform shipping legislation and port privileges, and similar measures of coöperation; and while the agreements actually reached at the meeting do not go to the full length of such radical economic changes, they forecast their probable adoption in the not too distant future. Whether it will be possible for the United States, which is now bearing the financial burden of many of the plans of coöperation adopted at Rio de Janeiro, to continue to do so when the emergency demands of the war are past is another question. But here the continental problem emerges into the larger problem of world-wide economic rehabilitation; and it can only be hoped that the fundamental faith of Secretary Hull in the policy of lowering the barriers of trade between nations, not only as a principle of economic prosperity but as a practical means of removing the causes of war, will be equal to the colossal task awaiting both the inter-American community and the world at large when the time of reconstruction comes at the close of the war.⁸⁷

The meeting at Rio de Janeiro took place less than ten years from the conference at Montevideo. In that short space of time there have come into being new principles of law, new rules of conduct, closer and more effective measures of coöperation, which have, indeed, changed radically the whole character of the inter-American community. A degree of unity has been attained which, in contrast to the rivalries, suspicion and distrust that existed little more than a decade ago, could scarcely have been believed

basis of the good neighbor policy." It is to be hoped, however, that his further observations to the effect that "only the economic solutions are fundamental" are not to be taken too literally. *Diario*, No. 13, p. 6.

⁸⁷ In the Resolution (XXV) on "Economic and Financial Coöperation," adopted at the Meeting of Foreign Ministers at Havana in 1940, it is declared:

"(a) That the American nations continue to adhere to the liberal principles of international trade, conducted with peaceful motives and based upon equality of treatment and fair and equitable practices;

"(b) That it is the purpose of the American nations to apply these principles in their relations with each other as fully as present circumstances permit;

"(c) That the American nations should be prepared to resume the conduct of trade with the entire world in accordance with these principles as soon as the non-American nations are prepared to do likewise; . . ."

possible. It is a triumph that might well give satisfaction to those who are responsible for it, if the tasks ahead were not of such magnitude as to leave little time for dwelling upon the successes thus far attained. To maintain and strengthen the new "continental solidarity" will require a strong sense of responsibility on the part of governments, and high standards of personal integrity; it will call for sacrifices of immediate national interests for the interest of the community as a whole; it will demand a sympathetic understanding of mutual domestic problems when continental policies are being evolved. In the presence of threats to the security and peace of their territories the American States have risen to the occasion and shown what it is possible to do when confronted with a common danger. It is imperative that the lesson thus learned shall not be forgotten when the crisis is past.

BRITISH PRIZE CASES, 1939-1941

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At the beginning of the present war the belligerents, of course, set up prize courts. Germany enacted a new Prize Law Code¹ and a new Prize Court Code.² But no belligerent, with the exception of Great Britain, has yet published reports of prize cases. True, compared with the enormous amount of prize cases during the war of 1914-1918³ in Great Britain,⁴ France,⁵ Germany⁶ and Italy,⁷ the number of British prize cases so far reported⁸ is comparatively very small.⁹ Yet it seems important to investigate these cases to which the science of international law has paid no attention up to now. It is proposed to give here a systematic study of these prize cases, from the points of view of substantive and formal prize law, and of the law of prize procedure.

I. THE LAW OF PRIZE PROCEDURE

(1) *Toute prise doit être jugée.* This norm of international law has always been observed by Great Britain.¹⁰ At the time of the outbreak of the present war, Great Britain enacted the Prize Act, 1939.¹¹ This Act has only the

¹ *Prisen-Ordnung*, Aug. 28, 1939, R.G. Bl. I, No. 161 of Sept. 3, 1939; English translation, *C.C.H. War Law Service*, 3rd vol. (Foreign Supp.), 65,569-65,576.

² *Prisen-Gerichts-Ordnung*, Aug. 28, 1939, R.G. Bl. I, No. 161 of Sept. 3, 1939; English translation, *C.C.H. War Law Service*, 3rd vol. (Foreign Supp.), 65,576-65,581.

³ See particularly the fundamental work by J. H. W. Verzijl, *Le droit des prises de la grande guerre* (Leiden, 1924). For a brief digest of British prize cases see H. Hull, *Digest of Cases decided in British Prize Courts 1914-1937* (London, 1937).

⁴ *Lloyd's Reports of Prize Cases 1914-1934* (10 vols., London); Trehern and Grant, *British and Colonial Prize Cases* (3 vols., London).

⁵ *Décisions du Conseil des Prises* (Paris, I, 1916, II, 1923).

⁶ *Entscheidungen des Oberprisengerichtes in Berlin*, I, 1918, II, 1921.

⁷ *Sentenze della Commissione delle prede, 1915-1918* (Rome, 1927).

⁸ *Lloyd's Reports of Prize Cases* (2nd Ser.), Vol. 1, No. 1, Jan., 1940, pp. 1-10; No. 2, May 2, 1940, pp. 11-26; No. 3, Aug. 19, 1940, pp. 27-42; No. 4, Jan. 8, 1941, pp. 43-56; No. 5, April 1, 1941, pp. 57-72.

⁹ They are not more than 34, of which 28 were decided in the British Prize Court in London, one in India, one in Newfoundland, two in Australia and two in South Africa.

¹⁰ Cf. "Seizure . . . does not affect the ownership of the thing seized. Before that can happen, the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted court of prize, and the captor must then ask and obtain its condemnation as prize." *The Odessa* (1915), 2 Ll. P. C. 405. "The obligation is unquestioned to bring the prize in for condemnation." *The Oscar II*, [1920] A.C. 748.

¹¹ 2 and 3 Geo. 6. ch. 65. Reprinted in J. Burke, *Loose-Leaf War Legislation* (London, 1939), pp. 25-29.

character of an amendment to the Naval Prize Act, 1864,¹² the Prize Courts (Procedure) Act, 1914,¹³ and the Prize Courts Act, 1915.¹⁴ The most important, and a very significant and far-reaching amendment, consists in the proviso that "the law relating to prize shall apply in relation to aircraft and goods carried therein as it applies in relation to ships and goods carried therein, and shall so apply notwithstanding that the aircraft is on or over land." The other important clause of the Prize Act, 1939, relates to the establishment of prize courts not only in Great Britain, the Dominions, India and the Colonies,¹⁵ but also "outside of H. M. dominions," namely, in any British protectorate, any League of Nations mandate, and "any other country or territory in which for the time being H. M. has jurisdiction in matters of prize."¹⁶ For the procedure in prize cases the Prize Rules, 1939,¹⁷ were published.¹⁸

(2) *Stare decisis*. The British Prize Court in London sat for the first time in the present war on November 2, 1939. The prize judge of this war is Sir Boyd Merriman (later Lord Merriman). When the first prize case—*The Pomona*¹⁹—came up, the prize judge pledged to do his best to follow the example of his predecessors and uphold the tradition of the British prize court. Notwithstanding all dicta to the effect that British prize courts apply international law directly in complete independence of municipal law,²⁰ British prize courts apply in fact British prize law, which may or may not be in conformity with international law. British prize law is formed by a body of precedents. The prize decisions of Lord Stowell have, to a great extent, created British prize law, and during the World War "the law as interpreted in British prize courts has received, under the familiar guise of decisions in particular cases, a new body of doctrine."²¹ The rule *stare decisis* applies in prize courts.²² This rule has come into prominence in the decisions of the present war, whereas, on other occasions, the prize judge, in dealing with precedents, has "distinguished" these cases from the actual ones.

¹² 27 and 28 Vict. ch. 25.

¹³ 4 and 5 Geo. 5. c. 13.

¹⁴ 5 and 6 Geo. 5. c. 57.

¹⁵ A schedule of British prize courts overseas during the World War is to be found in Verzijl, *op. cit.*, *supra*, note 3, annex to p. 8. Prize courts had been set up also in Zanzibar and Egypt. See Prize Courts Act, 1894, 57 and 58 Vict. c. 39.

¹⁶ Cf. The North Borneo Prize Court Order in Council (S.R. and O. 1939, No. 1136); Supreme Court of Palestine Order in Council (S.R. and O., No. 1137); Zanzibar (Prize Court) Order in Council (S.R. and O., No. 1138).

¹⁷ S.R. and O. 1939, No. 1466.

¹⁸ During the World War the Prize Court Rules, 1914, were in force.

¹⁹ 1 Ll. P.C. (2nd), 1 at p. 4.

²⁰ See *The Zamora*, 4 Ll. P.C. 62. For a fuller discussion see Kunz, *Kriegsrecht und Neutralitätsrecht* (Vienna, 1935), pp. 183-186, and the literature there quoted.

²¹ Hull, *op. cit.*, p. IV.

²² "This decision (in *The Franciska*, 10 Moo. P.C. 73) is, of course, binding upon their Lordships." *The Düsseldorf* (1920), 9 Ll. P.C. 12. "Their Lordships are bound by the decisions of their predecessors, which, consistent as they are, it is too late to overrule and impracticable to distinguish." *The Kronprinsessan Margareta* (1920), 8 Ll. P.C. 241.

(3) *Jurisdiction ratione materiae*. This jurisdiction, it may be said, covers all matters relating to captures at sea, and now also relating to aircraft on land or sea. "The chief function of a court of prize is to determine the question: prize or no prize."²³ But British prize courts exercise jurisdiction also over all problems connected with prizes. This jurisdiction embraces also the competence of the prize court to decide on its own jurisdiction, if this jurisdiction is challenged. A novel problem presented itself in the case of *The Astoria*,²⁴ where the Commonwealth Government of Australia moved for the requisition of this Danish vessel pending a decision of the court as to the condemnation of the ship as a prize of war. The Danish vessel was, at the time of the German occupation of Denmark, off the coast of New South Wales. The Naval Board sent a message to the captain directing him to proceed to Sydney. The master consulted with the Danish Consul-General in Sydney and decided to follow his advice. The representative for master and vessel objected to the ship being requisitioned without appraisalment, and challenged the jurisdiction of the prize court because "it would have to be established that a state of war existed between Britain and Denmark." The representative of the Crown tendered proclamations by the Commonwealth "as to the state of war" and a certificate by the Minister for External Affairs "as to the present condition of Denmark." The judge agreed that he had jurisdiction for the purpose of requisition and granted an order to this effect, but stated that he would not be able to make a final order until it was established in the suit for condemnation that the vessel was an enemy ship. We will come back to this case later.

The jurisdiction of the prize court covers also problems of prize procedure and problems concerning trading with the enemy.²⁵ The prize court has to apply strict law and cannot introduce considerations of equity, *e.g.*, as far as national or neutral mortgagees are concerned. "Under the existing practice," said Sir Boyd Merriman,²⁶ "it is quite plain that this court does not deal with bounty. Sir Samuel Evans said in the plainest words that he had nothing whatever to do with bounty."

(4) *Jurisdiction ratione loci*. This jurisdiction is determined by the port into which the captured ship is brought or where the goods have been seized. But under Section 1 of the Prize Courts Act, 1915, a prize court has power to transfer proceedings to another prize court, on application by the proper officer of the Crown, if the court is satisfied that the proceedings would be more conveniently conducted in this other prize court. In the case of *The Gabbiano*²⁷ proceedings started in the Prize Court of Gibraltar but were remitted to the London Prize Court.

Prize procedure overrides admiralty action. In the case of *The Pomona*²⁸ the British time-charterers prior to the outbreak of the war had put this

²³ *The Roumanian* (1915), 2 Ll. P.C. 378.

²⁴ (1940), 1 Ll. P.C. (2nd), pp. 53-54.

²⁵ *The Glencarn* (1940), *ibid.*, p. 63.

²⁶ *The Konsul Hendrik Fisser* (1940), *ibid.*, p. 24.

²⁷ *Ibid.*, p. 27.

²⁸ *Ibid.*, p. 1.

German vessel under arrest in a procedure in the admiralty court in which they were the plaintiffs. On September 3, 1939, *The Pomona* was seized and requisition by the Crown was granted by the prize court. In the case of *The Prins Knud*²⁹ a British firm which had rendered very valuable salvage services to this Danish ship prior to the German occupation of Denmark, had obtained from the admiralty court a salvage award of £6500; but the admiralty court directed that the judgment for the sum assessed should stand over until after prize proceedings.³⁰

(5) *Parties, Claims.* Prize procedure is an action *in rem*, brought by the captor State against the captured *res*. The suit is, therefore, initiated³¹ by the representative of the capturing State.³² Apart from the proper representative of the Crown, the interested parties may be represented. Such interested parties are, first of all, the owners. Even enemy owners have *persona standi in judicio*, not in general as alien enemies under common law are *ex lege*—and this refers to prize courts too—but *pro hac vice*. In the World War prize cases “enemy claimants have been repeatedly recognized to assert rights under international conventions, or to contest condemnation of their goods, if shipped or carried under circumstances which gave immunity from capture.”³³ These precedents were followed in the case of *The Pomona*.³⁴ In addition to owners, there have appeared as interested parties in the prize cases of the present war, national time-charterers of a seized enemy vessel,³⁵ national and neutral mortgagees,³⁶ national claimants for brokerage and dispatch money,³⁷ a national firm as seller claiming proceeds of sale,³⁸ the master of the vessel,³⁹ the salvors.⁴⁰

(6) *No appearance, no claims: six months rule.* Since “a claimant in a prize court is not in a position analogous to that of defendant, but rather to that of plaintiff,”⁴¹ the *onus probandi* is, generally speaking, on the shoulders of the claimant.⁴² Absence of any appearance or of any claim does not hinder the prize procedure, nor does it necessarily lead to condemnation. In the case of *The Benmacdhui (cargo ex)*⁴³ where the Crown asked for condemnation of parcels of cargo in a British vessel, no appearance was

²⁹ *The Konsul Hendrik Fisser* (1940), *Ibid.*, p. 57.

³⁰ See *The Chateaubriand* (1916), 5 Ll. P.C. 24.

³¹ See *The Odessa* (1916), 1 A.C. 145 at 153-154.

³² In Great Britain by the Procurator-General.

³³ *The Vesta* (1921), 10 Ll. P.C. 106 at p. 139. Cf. also *The Möwe*, 2 Ll. P.C. 70; *The Marie Glaeser*, 1 Ll. P.C. 56; *The Håkan* (1917), 5 Ll. P.C. 186; *The Gutenfels*, No. 1 (Egypt, 1915), 1 Br. and Col. P.C. 102.

³⁴ 1 Ll. P.C. (2nd), 1 at pp. 2, 5.

³⁵ *The Pomona*, *ibid.*, p. 1.

³⁶ *The Konsul Hendrik Fisser*, *ibid.*, p. 16; *The Christoph von Doornum*, *ibid.*, p. 49.

³⁷ *The Rheingold*, *ibid.*, p. 19.

³⁸ *The Gabbiano*, *ibid.*, p. 27.

³⁹ *The Astoria*, *ibid.*, p. 53.

⁴⁰ *The Prins Knud*, *ibid.*, p. 57.

⁴¹ *The Möwe* (1915), 2 Ll. P.C. 70.

⁴² *The Alwaki* (1940), 1 Ll. P.C. (2nd), p. 43.

⁴³ *Ibid.*, p. 6.

made; motion was made less than six months from service of writ. Prize Court Rules, 1939, Order 15, Rule 9,⁴⁴ is as follows:

No ship (or cargo) shall be condemned at the hearing in the absence of an appearance or claim until six months have elapsed from the service of the writ . . . unless there be on the ship papers . . . and on the evidence, if any, of the witnesses from the captured ship . . . sufficient proof that such ship . . . belongs to the enemy or is otherwise liable to condemnation.

The prize judge interpreted this rule to mean, as to evidence, that the ship or cargo must stand "self-condemned,"⁴⁵ that so-called "extrinsic evidence" is here excluded. The judge decided that in this case the cargo stood "self-condemned."

In *The Alwaki and other vessels (cargo ex)*,⁴⁶ the Crown asked for the condemnation of the cargo of four Dutch vessels and one Norwegian vessel as contraband after six months from the service of the writ, no claims having been made in the meantime. The problem arising in this case was as to the right of the Crown to invoke the six months rule and whether this rule is absolute. The Attorney General acknowledged that, prior to the Prize Court Rules, 1939, the general usage of nations fixed a period of one year and one day but pointed out that Sir Samuel Evans had substituted in many cases the six months rule. The prize judge asked why, if this rule is absolute, evidence should be given the court after the lapse of six months? The Attorney General admitted that seizure and lack of claim for six months is to be shown *prima facie*, and that if it were affirmatively shown to the satisfaction of the court that the goods were not contraband, or not condemnable, the six months rule should not apply. The judgment laid down that "it is not for the Crown, as a matter of pleading, to plead an affirmative case; the capture may be presumed to be in order until some claimant comes forward and establishes his claim." Enemy ownership is presumed after the lapse of a year and a day, if no claimant comes forward.⁴⁷ But the judge went into the question whether a municipal rule of procedure can legally substitute six months for a period recognized by the usage of nations. Relying not only on Sir Samuel Evans' decision in *The Antilla*,⁴⁸ but also on Lord Sterndale's decision in *The Frogner*,⁴⁹ the judge decided that the six months rule is not an absolute rule, the decision being based on the judicial interpretation of the municipal law.

(7) *Costs*. The determination of costs is in the discretion of the judge

⁴⁴ Cf. Prize Court Rules, 1914, Order 15, Rule 7.

⁴⁵ Cf. for the "out of the ship's mouth" doctrine, Deák and Jeesup, *Neutrality: I—The Origins*, pp. 217-224; the case, *Dos Hermanos*, 1817 (*Moore, Digest*, VII, pp. 611-612); Th. Baty, *Britain and Sea Law* (1911), pp. 60-70; Kunz, *op. cit.*, *supra*, note 20, p. 187.

⁴⁶ (1940), 1 Ll. P.C. (2nd), p. 43.

⁴⁷ Quoting Justice Story in *The Harrison*, 1 Wheaton 298.

⁴⁸ 7 Ll. P.C. 401, at p. 408.

⁴⁹ 8 Ll. P.C. 382, at p. 388.

under the Prize Court Rules, 1939, Order 18, Rule 1.⁵⁰ An interesting problem arose in the case of *The Gabbiano*, in which the decision as to proceeds of sale was in favor of the claimants, and claim for costs against the Crown was made.⁵¹ That in a proper case both damages and costs may be awarded against the Crown was laid down by the Privy Council in *The Zamora*.⁵² That the discretion of the judge in determining costs is to be exercised judicially was laid down in *The Stanton*.⁵³ The representative of the Crown argued that costs are never awarded in prize courts against the Crown, except in cases where the court also awards damages, quoting Sir Samuel Evans' decision in *The Kronprins Gustav Adolf*⁵⁴ and the Privy Council's decision in *The Baron Stjernblad*.⁵⁵ The theoretical problem involved in the discussion before the judge between the representative of the Crown and the representative of the claimants was whether a precedent as to the exercise of the prize judge's discretion as to costs is binding on a later judge. Counsel for claimants argued that the judge "could get assistance from the manner in which discretion has been exercised in the past, but that no court has the power to lay down a rule binding a judge to exercise his discretion only according to certain conditions." The representative of the Crown, on the other hand, argued that the judge's discretion as to costs has not only to be exercised judicially, but that "the way in which discretion had been exercised had been sanctioned by practice." The judge made no order as to costs, considering himself bound by the decision in *The Baron Stjernblad*, notwithstanding his discretion, holding that the decision in *The Baron Stjernblad* did not involve the manner in which discretion had been exercised, but constituted a rule of law.

(8) *Appeal*. From any order or decree of a prize court an appeal lies to the Privy Council, as of right in cases of a final decree and in other cases with the leave of the court making the order or decree.⁵⁶ In the case of *The Prins Knud*⁵⁷ the claimants wanted to take the legal issue presented by this case to the Privy Council. In conformity with Prize Court Rules, 1939, Order 44, Rule 3, the judge gave them leave and fixed £150 as security for the due prosecution of the appeal and the payment of all costs.

II. FORMAL PRIZE LAW

(1) *Capture of ships*. British prize law uses the terms "capture" and "seizure" as identical. The prize cases hitherto decided in British prize courts during the present war show capture of German (enemy) ships at

⁵⁰ In the same sense Prize Court Rules, 1914, Order 18, Rule 1.

⁵¹ 1 Ll. P.C. (2nd), pp. 34-41.

⁵² 4 Ll. P.C. 1, at p. 114.

⁵³ (1917), 6 Ll. P.C. 121.

⁵⁴ 6 Ll. P.C. 245, at p. 254.

⁵⁵ 6 Ll. P.C. 89 at p. 101: "If there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages." Cf. also the résumé of the practice of the London Prize Court as to costs, in *The Australia* (Ceylon, 1916), 2 Br. and Col. P.C. 315.

⁵⁶ Naval Prize Act, 1864, Art. 5.

⁵⁷ 1 Ll. P.C. (2nd), p. 57.

sea⁵⁸ as well as in British ports,⁵⁹ seizure of Italian (enemy) ships in a British port,⁶⁰ and seizure of Danish (enemy?) ships in British ports.⁶¹ The problem of destroying certain ships' papers or throwing them overboard before seizure arose incidentally in the case of *The Cap Norte*.⁶² The problem of a false flag arose in the case of *The Konsul Hendrik Fisser*,⁶³ a German vessel sailing under the Norwegian flag and having the Norwegian colors painted on her sides and on a hatch.

(2) *Seizure of goods*. Seizure of goods as enemy property at sea or in a British port on board British ships is upheld in many of the decided cases.⁶⁴ Seizure of goods as contraband on board neutral ships is upheld in other cases.⁶⁵

(3) *Requisition pendente lite*. Capture must be distinguished from condemnation, on the one hand, and, on the other, from measures affecting ships which do not come under prize law, such as the exercise of the *jus angariae*, sequestration of ships under economic war measures, "protective sequestration" for police reasons, "taking over" of ships under municipal law—e.g., for violation of an anti-sabotage statute—or as a measure of reprisal. "Detention" under Article 2 of the VIth Hague Convention of 1907 is also of a different character. Of particular importance is the requisition⁶⁶ of enemy

⁵⁸ *The Hannah Boge* (1 Ll. P.C. (2nd), pp. 5, 8), was captured at sea, while on a voyage to Germany; the *Cap Norte* (*ibid.*, p. 8), on a voyage from Buenos Aires to Hamburg, was seized by a Contraband Control Officer; the *Bianca* (*ibid.*, p. 9), was captured on a voyage from Rotterdam to Lisbon; the *Gloria* (*ibid.*, p. 11), bound from Buenos Aires to Antwerp and Hamburg was "seized near a contraband control station"; *The Biscaya* (*ibid.*, p. 12) was "arrested and taken to a contraband control port"; *The Henning Oldendorff* (*ibid.*, p. 12) and the *Eilbeck* (*ibid.*, p. 13) were captured; *The Konsul Hendrik Fisser* (*ibid.*, p. 16) was stopped on the high seas while en route from Vigo to Germany, captured and brought into a British port under orders from the warship; *The Rheingold* (*ibid.*, p. 18) was seized, while on a voyage from Durban to Dunkirk; *The Leander* (*ibid.*, p. 26) was captured.

⁵⁹ *The Pomona* (*ibid.*, p. 1), *The Elwira III* (*ibid.*, p. 8), *The Christoph von Doornum* (*ibid.*, p. 49).

⁶⁰ *The Remo* (*ibid.*, p. 52), *The Sistiana* (*ibid.*, p. 55).

⁶¹ *The Gudrun Maersk* (*ibid.*, p. 42), *The Astoria* (*ibid.*, p. 53), *The Kalo* (*ibid.*, p. 56), *The Prins Knud* (*ibid.*, p. 57).

⁶² 1 Ll. P.C. (2nd), p. 8. So-called "spoliation of documents," which constitutes sufficient ground for capture. See *The Ophelia* (1915), 3 Ll. P.C. 13; Dr. Lushington's decision in *The Johanna Emilie* (1854), Spinks 12.

⁶³ 1 Ll. P.C. (2nd), p. 16.

⁶⁴ *The Benmacdhui* (1 Ll. P.C. (2nd), p. 6); *The Newfoundland* (*ibid.*, p. 10); *The Egret* (*ibid.*, p. 10); *The Hawby* (*ibid.*, pp. 10, 14); *The Bassa* (*ibid.*, p. 13); *The Glengarry* (*ibid.*, p. 13); *The Soudan* (*ibid.*, p. 13); *The Glenroy* (*ibid.*, p. 13); *The Warwick Castle* (*ibid.*, p. 14); *The Mataroa* (*ibid.*, p. 14); *The Glencarn* (*ibid.*, p. 63).

⁶⁵ *The Alwaki and other vessels* (*ibid.*, p. 43). The neutral Italian ship, *Gabbiano*, was captured for carriage of contraband, had a prize crew put on board at Gibraltar and so arrived at Cardiff. Cargo from a neutral Danish vessel, *The Inge Maersk* (*ibid.*, p. 15), was seized at a contraband control station as absolute contraband.

⁶⁶ Other than under the right of angary, and under other hypotheses mentioned in the previous paragraph.

ships. Here again two possibilities arise: the requisition of captured ships or goods prior to the opening of proceedings in a prize court,⁶⁷ and the requisition of captured ships or goods during the prize court procedure, *i.e.*, requisition *pendente lite*.

As we have seen,⁶⁸ the rules of international law that the prize must be brought into a prize court and that capture does not affect the ownership of the thing seized,⁶⁹ have always been fully recognized by British prize courts; but under the Prize Court Rules, 1914, Order 29, as amended by the Order in Council of April 29, 1915,⁷⁰ the prize judge shall "when it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition on behalf of H. M. a ship (or goods) in respect of which no final decree of condemnation has been made, order that the ship be appraised and that upon an undertaking being given in accordance with Rule 5,⁷¹ the ship shall be released and delivered to the Crown." In case of urgency, requisition can be made without appraisalment.

In the famous case of *The Zamora*⁷² Sir Samuel Evans laid down that "the prize court has inherent powers to deal with the property brought within its jurisdiction as it may deem fit in the exercise of its discretion," that claimants have no right under international law to demand that the property be preserved in kind until the final decree determines whether it is to be released or condemned, and that, apart from the inherent powers of the prize court, the practice is prescribed by the Prize Court Rules, which violates no acknowledged and settled principle of international law because it deals only with a matter affecting procedure and practice of the court. The decision of the Privy Council,⁷³ reversing the decision of Sir Samuel Evans, denied this "inherent power" of the prize court. It said:

The primary duty of a prize court is to preserve the *res*. . . . The inherent power of the court as to sale or realization is confined to cases where this cannot be done. . . . Such a limited power would not justify the court in directing a sale of the *res* merely because it thought fit to do so, or merely because one of the parties desired the sale.

And with regard to requisition *pendente lite*, the same decision laid down that a belligerent Power has by international law the right of requisitioning vessels or goods in the custody of its prize court pending a decision whether they should be condemned or released, but such right is subject to certain limitations: (1) The vessel or goods must be urgently required

⁶⁷ Cf. German Prize Law Code, Aug. 28, 1939, Arts. 70, 71.

⁶⁸ *Supra*, note 10.

⁶⁹ Cf. also: "The effect of a condemnation is to divest the enemy subject of his ownership . . . and to transfer it to the Sovereign" (*The Odessa*, [1916] 1 A.C. 145, at p. 154). "Subject to condemnation in prize, the capture is for the Crown's benefit." *The Oscar II*, [1920] A.C. 748. See also *The Südmark* (1918), 6 Ll. P.C. 352.

⁷⁰ S.R. and O. 1918, No. 387.

⁷¹ Namely, an undertaking in writing by the proper officer of the Crown for payment into court on behalf of the Crown of the appraised value of the ship.

⁷² (1915), 4 Ll. P.C. 1.

⁷³ (1916), 4 Ll. P.C. 62.

for use in connection with the defense of the realm . . . ; (2) There must be a real question to be tried so that it would be improper to order an immediate release; (3) The right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.⁷⁴

Requisitioning does not divest the property in captured vessels from the owners thereof.⁷⁵ Requisition *pendente lite* in the present war is prescribed in the same sense by Order 29 of the Prize Court Rules, 1939. In the first prize case of the present war, *The Pomona*,⁷⁶ a motion was made by the Procurator-General for requisition without appraisalment of this seized German motor vessel. The prize judge granted the requisition, closely following *The Zamora* decision of the Privy Council, having found that the three conditions were fulfilled. And he allowed requisition without appraisalment,⁷⁷ but under an undertaking by the representative of the Crown to pay the value of the ship into court "at such time as the court shall declare by order that the same or any part thereof is required for the purpose of payment out of court," an undertaking which "will be available to meet any possible question which may arise out of the later history of this vessel in the hands of the Crown."

Requisition without appraisalment was also granted in the case of the German ship *Hannah Boge*.⁷⁸ This requisitioned ship was later condemned as a good and lawful prize.⁷⁹ Requisition of the Italian (enemy) ships *Remo*⁸⁰ and *Sistiana*⁸¹ was granted, in the first case after appraisalment, in the second for reasons of urgency without an order for appraisalment. The cases of requisition *pendente lite* of the Danish ships *Gudrun Maersk*,⁸² *Astoria*,⁸³ and *Kalo*⁸⁴ were exceptional, for reasons to be now examined.

III. SUBSTANTIVE PRIZE LAW

(1) *Existence of a state of war as pre-condition for the exercise of the right of prize—Danish ships.*

The exercise of the right of prize is legal from the beginning of the existence of a state of war. Whereas Britain's formal declaration of war on Germany on September 3, 1939, and Italy's declaration of war on Britain on

⁷⁴ See also *The Canton* (1916), 2 Ll. P.C. 264.

⁷⁵ *The Pellworm*, Privy Council, 1922, 9 Ll. P.C. 170, overruling the contrary holding by the prize court in *The Pellworm* (1920), 9 Ll. P.C. 158.

⁷⁶ 1 Ll. P.C. (2nd), p. 1.

⁷⁷ Cf. the case of *The Marie Leonhardt* (1920), 3 Br. and Col. P.C. 761.

⁷⁸ 1 Ll. P.C. (2nd), p. 6.

⁷⁹ *Ibid.*, p. 8. Thus also *The Biscaya* (*ibid.*, p. 12).

⁸⁰ 1 Ll. P.C. (2nd), p. 52.

⁸¹ *Ibid.*, p. 55.

⁸² *Ibid.*, p. 42: without appraisalment, the Crown filing an undertaking for payment into court of the appraised value of the ship.

⁸³ *Ibid.*, p. 53: requisition and payment into court of appraised value.

⁸⁴ *Ibid.*, p. 56: requisition, appraisalment of vessels and stores; undertaking by Crown for payment into court.

June 10, 1940, created a legally clear situation in this respect, questions of the existence of a state of war ⁸⁵ between Britain and Denmark arose later.

Up to April 9, 1940, Denmark was unquestionably a neutral State; but on April 10, 1940, she was, with her consent, occupied by Germany. Although Denmark made no declaration of war and in no way participated in hostilities, she is, as an enemy-occupied country, open to British attack; but is there a state of war between Britain and Denmark? Britain did not declare war on Denmark. The fate of Danish vessels on the high seas or in British ports was uncertain. Up to the present time, four such cases ⁸⁶ have come up in British prize courts.

The first case was that of *The Gudrun Maersk*,⁸⁷ a Danish ship which entered Bombay harbor on April 13, 1940. On April 15, a notification was published in the Bombay Government *Gazette Extraordinary* that the Central Government had decided that all Danish vessels entering port in the Province of Bombay should be seized; and the vessel was seized. The court granted the motion for requisition by the Crown.

The Kalo,⁸⁸ a Danish vessel, entered Durban and was taken into the custody of the South Africa (Natal) Supreme Court (In Prize). The court granted an order for requisition, after appraisalment, by the Crown, but held that it would not be justified in granting the immediate release of the ship "in regard to the contention that the ship was not an enemy ship, in view of the unusual circumstances created by the action of the German Government in overrunning Denmark" and that "argument that the ship was not an enemy ship could be addressed to the court in the contemplated proceedings for the condemnation of the ship as prize."

In the case of *The Astoria* ⁸⁹ the representative of the master and the vessel challenged, as reported above, the jurisdiction of the prize court. He referred to the Danish Shipping Commission in New York, which sought to establish control of all Danish ships outside occupied territory. The judge, going first into the question of jurisdiction, said he would have to be satisfied "that the ship came within the definition of a prize of war." The representative of the Crown, insisting on requisition, not on chartering, tendered proclamations by the Commonwealth Government "as to the state of war between Britain and Denmark." Counsel for the master objected on the ground that the statement was inadmissible. "The ordinary procedure of proving military occupation of a country by hostile forces was to give evidence of that fact." He insisted that, in order to give the court jurisdiction, "it would have to be established that a state of war existed between Britain

⁸⁵ See *The Nicolae* (1920), where the Rumanian Prize Court in the case of a Bolshevik vessel captured by Rumania in the Black Sea, on July 2, 1919, had to deal with the question whether a state of war existed between Rumania and Soviet Russia (Verzijl, *op. cit.*, pp. 239-241).

⁸⁶ *The Inge Maersk*, Feb. 22, 1940, 1 Ll. P.C. (2nd), p. 15, was still the case of a *neutral* Danish vessel.

⁸⁷ 1 Ll. P.C. (2nd), p. 42.

⁸⁸ *Ibid.*, p. 56.

⁸⁹ *Ibid.*, p. 53.

and Denmark." The representative of the Crown stated it would have to be determined at the hearing of condemnation whether the ship was a prize of war or not. The judge, in granting requisition, held that he could not make a final order until it was established in the suit for condemnation that the vessel was an enemy ship. "The question will arise as to whether this vessel, by reason of the occupation of Denmark, has assumed an enemy character or is simply a homeless wanderer."

In both cases, therefore, the question whether Danish ships were enemy ships was left for the suit for condemnation. The problem entered into a new phase with the case of *The Prins Knud*,⁹⁰ a real test case. This vessel had been arrested in prize on April 11, 1940, the day after the invasion of Denmark. On April 12, the writ in prize was issued and the arrest withdrawn, and on April 20, the Registrar, in appropriate procedure, permitted the Crown to requisition the ship. Counsel for the British salvors asked for an order that the Crown "do forthwith proceed to adjudication in this cause for condemnation." The Procurator-General handed to the judge a statement of the position of H. M. Government to the following effect: (1) After the German occupation of Denmark assurances were given that, speaking generally, Danish vessels seized as prize would be handed back to their owners after the war, and that, therefore (2) the present policy of H. M. Government is to refrain from seeking decrees of condemnation of Danish vessels seized as prize.

Counsel for salvors argued that the fact that the Government has adopted this policy does not affect the court in the exercise of its prize jurisdiction, and that the Government's procedure was contrary to the accepted rules of international law which governed the court's jurisdiction in prize. The Crown, he said, was not entitled to depart from the ordinary procedure and to act in a way contrary to the accepted canons of prize procedure: it was for the Crown to proceed to proper adjudication. A novel problem was thus raised: can the Crown be compelled by order of the court to continue the suit for condemnation of a prize, especially if the Crown asks for requisition of the thing seized *pendente lite*. There is, as far as this writer knows, no precedent available.⁹¹

The prize judge accepted the statement of the Government's policy as "a

⁹⁰ 1 Ll. P.C. (2nd), p. 57.

⁹¹ In *The Zamora*, [1916] 2 A.C. 77 at p. 108, the Privy Council laid down only the captor's duty to bring in promptly the property seized for adjudication: "If the captors do not promptly bring in the property seized for adjudication, the court will, at the insistence of any party aggrieved, compel them to do so." *The Zamora* decision further laid down as one condition for the requisition of the thing seized *pendente lite* that the right of requisition must be enforced by application to the prize court. It is further well settled in British prize law, contrary to the practice of other States, that the release by the organs of the captor, during or after prize procedure, must be sanctioned by the prize court. See *The Birkenfels and cargo* (1915), *Cases Decided in the Prize Courts of South Africa, 1914-1918* (Capetown, 1925), p. 39.

matter of high interest to the realm," and said in an *obiter dictum* that "Denmark had become an enemy country" and that "here the vessel in question is, beyond doubt, within the meaning of prize law, an enemy vessel." As to the decision of the novel problem, he admitted that he was "at one time in some doubt whether the action taken to requisition the vessel, while at the same time saying that there was no intention to seek condemnation, was consistent with the decision of the Privy Council in *The Zamora*, but that he has been satisfied that there is really no conflict," for *The Zamora* decision forbade requisition merely by executive order and insisted on requisition in prize and in advance of condemnation. In this case the Government had undertaken that there would be no release to owners without application to the prize court, and then only upon proper notice to claimants, and that, finally, the same undertaking applied to any sum brought into court in lieu of the ship in the event of her loss. "The mere fact that the Government have expressed a unilateral intention of taking a course which will not involve condemnation, ultimately does not seem to me really to affect the matter one way or the other. I think I should be doing wrong if I made an order compelling the Crown to bring this case to adjudication," as such decision would, "in effect, reverse the decision on policy at which the Government has arrived."

The four Danish ships cases are, therefore, inconclusive, as far as the topic of this paragraph is concerned. The question before the court was only that of requisition *pendente lite*. The prize judges agreed that the right of prize against these Danish vessels could legally have been exercised only if the Crown could prove that they were enemy vessels. This issue has to be decided in the proceedings for the condemnation of these ships as prize. While the rule of international law, according to which the existence of a state of war is a necessary pre-condition for the legal exercise of the right of prize, is unquestioned, the only question to be decided is whether this condition was fulfilled; whether, in other words, a state of war existed in law between Britain and Denmark, whether these ships have "by reason of the German occupation of Denmark assumed an enemy character." On this question the prize judges made no decision, for the above-quoted words of the prize judge in *The Prins Knud* case constitute merely an *obiter dictum*. But not only have, up to now, such proceedings for condemnation not taken place, but, in consequence of the British policy as to Danish ships, it is unlikely that they ever will take place. The statement of this British policy by the Procurator-General is legally open to attack; for the formula to hand these ships "seized as prize" after the war back to the owners, contains a *petitio principii*; the words "seized as prize" beg the question which is exactly the question to be decided by the prize court.

(2) *Seizure on land*. As in the World War, during the present war the right of prize has been exercised not only on the high seas and in ports, but sometimes even on land,²² and captures have been made not only by men-of-

²² See *The Roumanian* (1914, 1915), 1 Ll. P.C. 191, 2 Ll. P.C. 387.

war, but also by port authorities, contraband control officers, customs officers, and so on. In the case of *The Glenearn* ⁹³ the ship had arrived at London harbor about August 24, 1939; the goods had been unloaded and placed in a Port of London Authority's warehouse on September 1; and on September 12 they were received into the British firm's own warehouse, where they were seized as prize on October 9, 1939. But the court, as we shall see later, gave judgment in favor of claimants.

(3) *Enemy character of vessels.* Enemy merchant vessels, apart from the exceptions recognized by international law, are always subject to capture and condemnation; but the question, What is a merchant vessel? can lead to difficulties.

Is purpose or ownership the criterion? ⁹⁴ Are, therefore, merchant vessels in the sense of prize law all ships which are not state-owned, so that the merchant vessel would be identified with the privately-owned ship, or only those privately-owned vessels that are destined for trade? The problem arose in the World War, particularly with regard to pleasure yachts, and especially under the VIth Hague Convention of 1907. German, British and French prize courts condemned pleasure yachts in the World War. Whereas German prize courts, in cases in which the VIth Hague Convention of 1907, was not involved, condemned them as being merchant vessels, ⁹⁵ British ⁹⁶ and French ⁹⁷ prize courts, in order to deprive them of the benefit of the VIth Hague Convention, condemned pleasure yachts as not being merchant vessels. But in the present war, with the VIth Hague Convention denounced by Britain, the prize court did not go into the question of the benefit of this convention and condemned the small pleasure yacht *Elvira III* ⁹⁸ simply as German owned. The flag ⁹⁹ is of great importance also under British prize law, and the flying of an enemy flag, in fact, creates a non-rebuttable presumption of enemy character.¹⁰⁰ Enemy character is determined by legal ownership ¹⁰¹ at the date of capture, a principle often applied in the prize cases of this war. "British prize courts have made ownership the criterion of national character."¹⁰²

(4) *Neutral, national or allied rights in or against enemy vessels.* Such

⁹³ 1 Ll. P.C. (2nd), p. 63.

⁹⁴ Cf. Kunz, *Kriegsrecht und Neutralitätsrecht* (Vienna, 1935), p. 114.

⁹⁵ *The Primavera* (1916), Entsch. I, 194.

⁹⁶ *The Germania No. 1* (1917), 4 Ll. P.C. 263; *The Oriental* (1915), 1 Ll. P.C. 575.

⁹⁷ *The Tolna* (1920), *Revue Générale de Droit International Public*, 1920, p. 90.

⁹⁸ 1 Ll. P.C. (2nd), p. 8.

⁹⁹ Declaration of London, 1909, Art. 57. The Order in Council of Oct. 20, 1915, replaced the London Declaration, Art. 57, in British prize courts by the principles and rules observed by these courts prior to 1909.

¹⁰⁰ "She was flying the German flag at the time of capture" (*The Henning Oldendorff*, 1 Ll. P.C. (2nd), p. 12).

¹⁰¹ See *The Odessa* (1915), 2 Ll. P.C. 405.

¹⁰² *The Christoph von Doornum*, 1 Ll. P.C. (2nd), p. 49, at p. 51.

rights are equally subject to condemnation.¹⁰³ The following problems arose in the British prize cases of this war:

(a) *British time charterers of a captured German vessel. The Pomona*,¹⁰⁴ a German vessel, was under time-charter (for seven months every year, the charter to run until 1946) to the Jamaica Banana Producers' Association Ltd., a British firm. The conduct of the master and the owners was such that the Association treated it as a repudiation of the charter-party and, on its motion, the vessel was arrested in admiralty on August 25, 1939. On September 3, the vessel was seized. The representative of the Crown stated that "seizure overrode all mortgages, liens and all other rights of every kind," and the representative of the time-charterers, not opposing the motion for requisition, agreed entirely that "the rights of the Crown took precedence over the charterer's rights as plaintiffs in the action mentioned" in the admiralty court.

(b) *Neutral charters of captured German vessel. The Bianca*,¹⁰⁵ a German vessel, chartered by a Portuguese company under a pre-war charter-party, was condemned as good and lawful prize.

(c) *Mortgagees not in possession. The Konsul Hendrik Fisser*,¹⁰⁶ originally a British vessel, was sold in 1937 to a German company, the money being advanced by a British firm on mortgage. At the date of seizure a sum of £30,000 was outstanding. Apart from these national mortgagees, there was a second, a neutral (Dutch) mortgage. Counsel for the national and neutral first and second mortgagees pleaded, first that the right of the mortgagees ought to prevent the Crown from obtaining condemnation at all, and, alternatively, if the ship be condemned, it should be subject to a charge on her value to protect the mortgagees' security. Both mortgages were undisputed and perfectly valid in law. The British contract provided further that the mortgagees were to hold the ship as security by way of first mortgage, were to be permitted to collect all freights in respect of the vessel and were authorized to act as chartering agents, ship brokers and otherwise. The court was satisfied that the mortgagees exercised not only in law, but in fact, a very strict control over the movements of the vessel. The mortgagees were further entitled to take immediate possession of the ship and register her as a British vessel in case of default or of impossibility to renew insurances except at a rate of premium exorbitant in their opinion. At the outbreak of war the ship was on a voyage from Newfoundland to Antwerp and Bordeaux, but because of the war she put into Vigo and later tried to go back to Germany, when she was captured. The mortgagees intended, when the ship arrived at Bordeaux, to take steps to obtain possession of the vessel and register her as a British ship, and had instructed their solicitors to this effect. Because of the right of control and of possession, counsel for mortgagees tried to distinguish this case from the pre-

¹⁰³ So already Lord Stowell in *The Tobago* (1804), 5 C. Rob. 218.

¹⁰⁴ 1 Ll. P.C. (2nd), p. 1.

¹⁰⁵ *Ibid.*, p. 9.

¹⁰⁶ *Ibid.*, p. 16.

edent of *The Marie Glaeser*,¹⁰⁷ but the judgment followed the precedent of that case, according to which mortgagees, British or neutral, not in possession of a ship captured as prize, can not only not prevent condemnation, but are not entitled to have the mortgage debt paid to them out of the proceeds thereof. The ship was condemned and the claims of the two mortgagees dismissed with costs; for, as the judge said, there is a great difference "between instructing solicitors to take steps to enforce rights to take possession and taking possession."

(d) *Mortgagees in possession.* Mortgagees not in possession have no *locus standi*, as held in *The Konsul Hendrik Fisser*. The case of *The Christoph von Doorum*¹⁰⁸ was very similar. A captured German vessel had, in 1937, been sold from England to Germany, indeed to the same firm as *The Konsul Hendrik Fisser* under a mortgage by the same London firm, the mortgage deed being identical. But in this case the mortgagees had enforced their right to take possession; the vessel had been arrested on August 26, 1939, seized on September 3, 1939, later chartered by the Crown and was, during a voyage to England, torpedoed and beached, becoming a total loss. Counsel for British mortgagees resisted condemnation, claiming that they were the true and lawful owners of the vessel as mortgagees in possession. But the court, relying on the decisions in the cases of *The Marie Glaeser* and *The Odessa*, and quoting the American case of *The Hampton*¹⁰⁹ as well as *The Konsul Hendrik Fisser*, condemned the ship and dismissed the claim of the mortgagees. "If they had taken proceedings in the nature of foreclosure and had transferred the ship to British registry, the position might possibly be different."

(e) *Brokerage, dispatch money.* In the case of *The Rheingold*¹¹⁰ the Crown asked for the condemnation of this German vessel and of the freight. The vessel was, at the time of capture, time-chartered to another German company, and they had chartered her to a British firm in Durban. The time-charter had been negotiated by British brokers in London; the voyage charter to the British firm in South Africa had been effected by their British brokers. Brokerage was claimed by the London firm which acted as agents

¹⁰⁷ 1 Ll. P.C. 56: "The court has no hesitation in pronouncing upon the authorities, upon principle, and upon grounds of convenience and practice, the claim of the neutral mortgagees of this captured vessel must be rejected. The same conclusion would be arrived at, if the claims were by British subjects." See also *The Odessa*, 2 Ll. P.C. 405, where it was held that legal ownership, as the criterion of enemy character, means the property as opposed to any special rights created by contract, whether this contract was made before or after the outbreak of war, but that the power of the Crown to redress hardship caused to subjects by decrees of the prize court by the grant of bounty is unimpaired. But, as Sir Samuel Evans stated in *The Marie Glaeser*: "The prerogative of bounty is another matter; I have nothing to do with that; I am here merely to administer the law."

¹⁰⁸ 1 Ll. P.C. (2nd), p. 49.

¹⁰⁹ 5 Wall. 372: "In proceedings in prize and under principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens, subject to being overridden by the capture."

¹¹⁰ 1 Ll. P.C. (2nd), p. 78.

for the German time-charterers, and for another London firm which acted as agents for the South African charterers and which also claimed dispatch money. Counsel for claimants argued that the brokers were entitled to be paid out of the freight the commissions they had earned. The vessel was captured on a voyage from Durban to Dunkirk and brought into an optional port under the voyage charter; the freight was paid by British consignees. The prize judge, relying again on the decision in the case of *The Marie Glaeser*,¹¹¹ condemned the ship and the freight, and dismissed the claims with costs. For brokers, in respect of their brokerage on freight, cannot be in a better position than mortgagees who have a charge on the ship itself.

(f) *Salvage*. In the case of *The Prins Knud*,¹¹² an English firm had by tugs rendered important salvage services in February and March, 1940, and the admiralty court assessed the salvage award at £6500, but directed the judgment to stand over until after prize proceedings,¹¹³ for, after the German occupation of Denmark, this Danish ship was seized. As mentioned above, the principal problem of the case dealt with the question whether the Crown could be compelled to continue the condemnation proceedings. The court decided that the rights of the salvors should be postponed for determination and satisfaction until the end of the war, but should be safeguarded by registration.

(5) *Enemy or non-enemy character of cargo*.

(a) *Cargo on board an enemy ship is presumed to be of enemy character*. This presumption is rebuttable, but the *onus probandi* is on the claimants.¹¹⁴ In the case of *The Pomona*,¹¹⁵ this German vessel was on time-charter to a British firm, and their counsel stated that there were on board the vessel about 500 tons of bunker oil; the question arose whether to condemn it as part of the ship's furniture, or not to condemn it on the ground that it was of British ownership. This question was not decided, but the representative of the Crown was willing to pay the value of the fuel oil, if it turned out that the oil, which, under the charter, was provided and paid by the charterers, ought not to be condemned.¹¹⁶

In the case of *The Bianca*,¹¹⁷ the Crown asked for condemnation of this German vessel and cargo on the presumption that all goods on board an enemy ship were *prima facie* enemy property. The ship, with a cargo of

¹¹¹ 1 Ll. P.C. at p. 111: "What I have said as to the shareholders applies with greater force to those who have advanced sums of money, or rendered services, such as brokerage. As judge of the Prize Court, I cannot allow such claims."

¹¹² 1 Ll. P.C. (2nd), p. 57.

¹¹³ See *The Chateaubriand* (1916), 5 Ll. P.C. 24.

¹¹⁴ See the cases: *The Roland* (1915), 2 Ll. P.C. 253; *The Palm Branch*, 6 Ll. P.C. 1; *The Australia* (Ceylon, 1916), 2 Br. and Col. P.C. 315.

¹¹⁵ 1 Ll. P.C. (2nd), p. 1.

¹¹⁶ See *The Hamborn* (1919), 7 Ll. P.C., 67: condemnation of an enemy vessel; bunker coal being the property of the American time-charterers did not pass as part of the vessel.

¹¹⁷ 1 Ll. P.C. (2nd), p. 9.

coal, was captured on a voyage from Rotterdam to Lisbon. The judge, condemning the vessel, held over the question of the cargo, as it was a pre-war charter-party, a pre-war shipment in a ship chartered by a Portuguese company, and as the shipment, on the face of documents, was to a named consignee in Portugal. The representative of the Crown relied on the presumption mentioned, and on the fact that no appearance had been entered by the consignee or any other claimant, but admitted the possibility that under the contract for sale the property in the coal had passed to the neutral consignee at the date of seizure.

In the case of *The Gloria*,¹¹⁸ a motion for the condemnation of this German ship and part of her cargo was granted. The contraband issue did not come up, only the presumption "enemy ship, enemy goods" until the contrary is shown, a presumption valid regardless of the destination of the ship.¹¹⁹

(b) *Passing of property—Ante bellum contracts.* In the case of *The Benmacdhui*,¹²⁰ application by the Crown for condemnation of parcels of cargo in a British ship was granted. The goods were consigned before the war to the order of German firms at Hamburg. The Crown asserted that evidence on the papers showed that these goods belonged to the enemy, that property had passed to the consignees and was enemy-owned at the crucial date of capture. The judge followed a decision of Sir Samuel Evans¹²¹ by accepting as *prima facie* evidence of enemy property the consignment to, or to the order of, an enemy firm in an enemy port.

In the interesting case of *The Gabbiano*,¹²² the Crown asked for the condemnation of a cargo of 9000 tons of manganiferous ore, or the proceeds thereof, shipped by the Sinai Mining Company, Ltd., a British company, in an Italian ship from a port in Egypt to Stettin on August 27, 1939, under an *ante bellum* contract of sale of December 23, 1938, made between the claimants as sellers and a Czechoslovakian company as buyers. By letter of April 11, 1939, after the establishment of the German "protectorate of Bohemia and Moravia," the buyers exercised their option to receive the goods at Stettin. On July 11, 1939, full payment was made in sterling as a voluntary payment in advance. *The Gabbiano* was chartered on July 14, 1939. At the time of the outbreak of war this neutral Italian vessel was bunkering at Messina. Claimants arranged that the ship should proceed with the cargo to England. She was seized at Gibraltar and brought under a prize crew to Cardiff. Soon after arrival the cargo was sold.

¹¹⁸ 1 Ll. P.C. (2nd), p. 11.

¹¹⁹ In *The Roland*, Sir Samuel Evans stated: "According to prize law, property upon an enemy ship consigned to an enemy port is *prima facie* enemy property." But in *The Australia*, the court held in a case where the cargo was not consigned to an enemy port that: "Sir Samuel Evans did not intend to engraft any such limitation upon the principle he was affirming."

¹²⁰ 1 Ll. P.C. (2nd), p. 6.

¹²¹ In the unreported case of *The Durham Castle*, Sept. 16, 1914.

¹²² 1 Ll. P.C. (2nd), p. 27.

The question was whether the property had remained in the claimants at the date of seizure. The Crown argued on these lines: the contract is expressed to be a c.i.f. contract; under such a contract it is customary to take the bills of lading to seller's order because payment is to be made against tender of the shipping documents. In such cases the *prima facie* presumption of the reservation of the right of disposal, under Section 19/2 of the Sale of Goods Act, 1893, is invoked, with the result that the property in the goods does not pass. In this case payment had been made in advance of shipment, and, therefore, the property passed to the enemy buyers at the date of shipment. The Crown asked the court to treat the contract as an f.o.b. contract¹²³ and relied on the decision in *The Parchim*.¹²⁴

This case is distinguishable from that of *The Parchim*; for in the case of *The Gabbiano* the contract contained a clause according to which in case of loss of the ship or inability to deliver the cargo or any part thereof, "the quantity of ore so undelivered shall be written off the contract. The judge went into the question of what is a c.i.f. contract under English commercial law.¹²⁵ While the mentioned clause is inappropriate to a c.i.f. contract proper, the contract may remain a c.i.f. contract, but with variations. The judge came to the conclusion that in taking the bills of lading to their own order, the British sellers did not do so as the agents or on behalf of the buyers, but intended to reserve the right of disposal and thus to retain the property in the goods. Judgment was, therefore, in favor of claimants who had established their right to the release to them of the proceeds of this cargo.

(c) *Transfer in transitu. Contract made imminente bello. Trading with the enemy.*

The Gabbiano is a case of a *bona fide ante bellum* contract; in consequence, English commercial law is to be applied, and if, under this law, property remained in the British sellers at the moment of seizure by the Crown, the goods are not subject to condemnation, notwithstanding their enemy desti-

¹²³ Contrary to the prize courts of other States, British prize courts distinguish between *ante bellum* contracts, contracts made *imminente bello*, and *post bellum* contracts. Equally contrary to the practice of prize courts of other States, British prize courts, in deciding the question of ownership of captured cargo in cases of *bona fide ante bellum* contracts, apply the English municipal law. See particularly *The Miramichi* (1914), 1 Ll. P.C. 157. As to taking into account the Sale of Goods Act 1893, see *The Marquis Bacquehem* (Egypt, 1915), 2 Br. and Col. P.C. 96; on the f.o.b. clause, see *The Sörfareren* (1915), 4 Ll. P.C. 174; on the c.i.f. clause, see *The Miramichi*, *The Derflinger* (1918), 7 Ll. P.C. 394, *The Parchim* (1915, 1917), 4 Ll. P.C. 375, 338, and *The Australia* (Ceylon, 1916), 2 Br. and Col. P.C. 315: "The effect of the shipment of goods f.o.b. is undoubtedly, as a general rule, to transfer the risk of loss of the property from the seller to the buyer and to put an end to the right of stoppage in transitu"; in a c.i.f. shipment "the goods are at the risk of the purchaser." On the clause "no arrival, no sale", see *The Derflinger*, No. 2 (Egypt, 1915), 1 Br. and Col. P.C. 398.

¹²⁴ 4 Ll. P.C. (1918), 388.

¹²⁵ Relying on the authority of *Johnson v. Taylor Brothers & Co. Ltd.* [1920] A.C. 144 at pp. 155-156.

nation. The question is very different in cases of *post bellum* contracts or contracts made *imminente bello*. This question was involved in the interesting and complicated case of *The Glenearn*.¹²⁶ The facts were as follows: A British company on April 18, 1939, entered into an agreement with a German company for the sale of latex rubber by the British company. *The Glenearn* sailed with the rubber about July 24, 1939, from Shanghai to Hamburg; she arrived in London on August 23, 1939, and the voyage to Hamburg was abandoned. In the ordinary course of business two other cargoes of latex rubber were also on their way to this German firm on board German ships, and had been landed at Genoa. The claimants had not been paid in respect of the Genoa cargoes, whereas they had handed over, on August 16, the documents of *The Glenearn* cargo against acceptance of a bill of exchange for the price named in the provisional invoice. On August 25, when the claimants learned of the abandonment of *The Glenearn's* voyage from London to Hamburg, they were the sellers of the London cargo, who had parted with the documents of title and had been paid, and were in respect of the Genoa cargoes unpaid sellers who had not parted with the documents.

On August 28, the British and the German firms agreed to exchange the Genoa for the London cargo which at that time was discharged into the Port of London Authority's warehouses. The exchange agreement was confirmed by a letter of the German firm dated August 30. The shipping documents were exchanged through a banking firm in Amsterdam. The claimants were paid for the Genoa cargo and had to pay as buyers for the London cargo. Under the Sale of Goods Act, 1893, Section 18, property in the London cargo had re-passed to the claimants before the outbreak of war. On September 1, 1939, the claimants instructed their usual warehousemen to clear the goods and take them to store as soon as possible. The warehousemen took delivery from the Port of London Authority's warehouse on September 11, and the goods were received in their own warehouse on September 12, where they were seized as prize on October 9, 1939.

The representative of the Crown insisted that "the English company lent itself to a scheme by which the risk of capture was taken off the shoulders of the German company." The exchange agreement as a contract made *imminente bello* in fraud of belligerent rights, cannot be recognized in a prize court, is against public policy, and is void under municipal and under common law, as well as under the Trading with the Enemy Act, 1939.¹²⁷ Counsel for the claimants argued that the sale was valid under municipal

¹²⁶ 1 Ll. P.C. (2nd), p. 63.

¹²⁷ 2 and 3 Geo. 6, ch. 89 (Sec. 2 gives the definition of an enemy), reprinted in J. Burke, *Loose-Leaf War Legislation* (London, 1939), pp. 213-222. Trading with the Enemy (Custodian) Order, 1939 (S.R. and O. 1939, No. 1198), *ibid.*, p. 26. Cf. also Krusin & Rogers, *The Solicitor's Handbook of War Legislation* (London, 1940), pp. 236-264, and the same, First Supplement (London, 1940), pp. 19-23.

law, as the common law allows entering into any transaction with a person who may, in the future, become an enemy; nor was there anything illegal under the Trading with the Enemy Act merely because, for a brief period, the goods had belonged to someone who was not then, but subsequently became, an enemy. The judgment decided first that the doctrine of public policy could not be invoked because the purchase of *The Glenearn's* cargo did not offend any existing legislation, and because the common law and the Trading with the Enemy Act forbidding any form of commerce with the enemy, apply only to transactions after the outbreak of war, not to transactions completed before the outbreak of war with a potential enemy.

The judgment then considered the case in prize law. The contract was made *bona fide* in the sense that there was no secret clause or collusive understanding that it was to be disregarded should war not break out; but it was certainly also a contract made *imminente bello*. Quoting decisions ¹²⁸ to this effect, the judge held that in the case of a *bona fide* contract made *imminente bello*, the buyer cannot establish his claim to the goods unless he has taken actual delivery before seizure. The present case offered two novel features:

(a) The buyer was not a neutral but a national. The difference is that no considerations of the comity of nations can apply and that a British claimant is subject to the municipal law concerning trading with the enemy. Therefore, nothing less than actual delivery would avail the claimants.

(b) Does the term "transit" in prize law apply only to goods which at the outbreak of war were at sea ¹²⁹ or also to goods warehoused in a port of the realm? ¹³⁰ Without expressing a final opinion on this point, the judge assumed that in the Port of London Authority's warehouse the goods were still in transit. As they were not seized there, but in the claimant's own warehouse, the claimants had taken actual delivery, contrary to the

¹²⁸ Older cases: *The Jan Frederik* (1804), 5 C. Rob. 128; *The Baltica* (1857), 11 Moore's P.C. 141. World War cases: *The Southfield* (1915), 3 Ll. P.C. 404; *The Daksa* (1917), 5 Ll. P.C. 317. See *The Kronprinsessan Margareta* (1917), 6 Ll. P.C. 222: "It is well established as a principle of prize law that during . . . imminent danger of hostilities, the property in cargoes of belligerent parties cannot change its national character *in transitu*; and that if neutrals purchase goods *in transitu* during a state of impending danger of war, the contract of purchase is held invalid." *The Kronprinsessan Margareta* (1920), 8 Ll. P.C. 241 at 257: "The law of prize . . . refuses to recognize transfers of the ownership of movables afloat from an enemy transferor to a neutral transferee when unaccompanied by actual delivery of the goods." Cf. also *The Vrow Margareta* (1799), 1 C. Rob. 336.

¹²⁹ Thus counsel for claimants, quoting *The Roumanian*, 2 Ll. P.C. 378 at p. 394, the words "while at sea" in *The Kronprinsessan Margareta*, 8 Ll. P.C. 241, at p. 257; he could also have quoted the words "transfer of goods at sea" in *The Daksa*, 5 Ll. P.C. 317.

¹³⁰ Thus the representative of the Crown, quoting *The Roumanian*, 2 Ll. P.C. 378 at p. 403, and the words: "so long as the original transitus is deemed to continue" in *The Vesta* (1921), 10 Ll. P.C. 106 at p. 127.

opinion of the representative of the Crown,¹³¹ and judgment was in favor of claimants.

(6) *Declaration of Paris, 1856, Article 2*. "All enemy property—ships and cargoes—may, after the outbreak of war, be captured *jure belli* on the sea or in rivers, ports and harbors of this country,"¹³² as far as there is no recognized exception under international law. One of these exceptions is enemy cargo on board neutral ships, except contraband of war, under Article 2 of the Paris Declaration of 1856.¹³³ But enemy goods on board British ships are subject to capture and condemnation.¹³⁴ Whereas in the World War, Great Britain and France openly violated Article 2 of the Declaration of Paris by their Reprisal Orders,¹³⁵ British prize cases in the present war show respect for this rule¹³⁶ by implication. In the case of *The Benmacdhui*,¹³⁷ the prize judge referred to the fact that the enemy goods were on board British ships, "because, if these goods had been in a neutral ship, the Declaration of Paris would have applied, unless it could be shown that they were contraband of war."

(7) *Property of master and crew*. Property of master and crew of an enemy vessel is often held to be exempt from condemnation.¹³⁸ In the case of *The Pomona*,¹³⁹ the Crown gave an undertaking to hand back the personal effects of master and crew, and the judge, quoting the practice prevailing during the World War, "approved, for all other cases, of the release of the effects of master and crew of any vessel."

(8) *VIth Hague Convention of 1907*. Another well established exception was the "days of grace" under the VIth Hague Convention of 1907.¹⁴⁰ Such days of grace were often granted in the World War. While the granting of such days of grace was not a legal duty even under this convention, the ships could not, under Article 2, be confiscated, but only requisitioned against indemnity or detained under duty to restore them without indemnity. In the first prize case of the World War, *The Chile*,¹⁴¹ the so-called "Chile order"—"detention until further order"—was made.¹⁴²

¹³¹ Invoking *The Bawean* (1918), 7 Ll. P.C. 113.

¹³² *The Roumanian* (1914), 1 Ll. P.C. 197.

¹³³ "Le pavillon couvre la marchandise."

¹³⁴ See *The Aldworth* (1914), 1 Ll. P.C. 137, *The Miramichi* (1914), 1 Ll. P.C. 157, *The Roumanian* (1915), 2 Ll. P.C. 378; and in the present war the cases: *The Benmacdhui*, 1 Ll. P.C. (2nd), 6; *The Newfoundland*, *ibid.*, 10; *The Egret*, *ibid.*, 10; *The Bassa*, *ibid.*, 13; *The Glengarry*, *ibid.*, 13; *The Soudan*, *ibid.*, 13; *The Glenroy*, *ibid.*, 14; *The Warwick Castle*, *ibid.*, 14; *The Mataroa*, *ibid.*, 14.

¹³⁵ British Orders in Council of March 11, 1915, and Feb. 16, 1917; French Decree of March 13, 1915. See Kunz, *Kriegsrecht und Neutralitätsrecht* (Vienna, 1935), pp. 255-256.

¹³⁶ Thus also the decision in *The Dirigo and other vessels* (1919), 8 Ll. P.C. 395.

¹³⁷ 1 Ll. P.C. (2nd), 6 at p. 7.

¹³⁸ See *The Schlesien No. 1* (1914), 2 Ll. P.C. 92.

¹³⁹ 1 Ll. P.C. (2nd), 1.

¹⁴⁰ Cf. Kunz, *op. cit.*, pp. 167-168.

¹⁴¹ (1914), 1 Ll. P.C. 8: "I pronounce *The Chile* to have belonged at the time of seizure to enemies of the Crown, and to have been properly seized; and on the application of the Crown, I order that the ship be detained by the marshal until a further order is issued by the court."

¹⁴² Still after the World War, judgments concerning the VIth Hague Convention of 1907

But as Great Britain had denounced ¹⁴³ the Vith Hague Convention of 1907, no days of grace were granted in the present war and vessels seized in port at the outbreak of war were simply condemned as good and lawful prize.¹⁴⁴ *The Christoph von Doornum* ¹⁴⁵ was seized on September 3, 1939, while being arrested and under *vis major* in port, but this aspect of the case was not even mentioned. Exactly the same situation existed in the case of *The Pomona* ¹⁴⁶ the representative of the Crown pointed to the fact that the Vith Hague Convention had been denounced by Britain. The judgment said that the owners appeared to raise the question whether the vessel, having been detained in an English port at the outbreak of war by *force majeure*, should be subjected to an order for detention until the end of the war in the form of the "Chile order." But since the Crown was applying for requisition, not for condemnation, this question was reserved for a later stage of the procedure.

(9) *Equipment of ship.* Objects which are part of the equipment of an enemy ship are subject to condemnation. In *The Biscaya* ¹⁴⁷ not only the ship, but also her wireless installation which had been removed, was condemned as good and lawful prize.¹⁴⁸

(10) *Neutral goods on enemy ship.* That neutral goods on board enemy ships are free, with the exception of contraband of war, has been recognized in the World War and in the present war. In *The Bianca* ¹⁴⁹ case the vessel was condemned, but the question of the cargo—coal shipped to a named neutral consignee in Portugal—was held over, as "it was difficult for the court to draw the inference that the cargo was enemy property."¹⁵⁰ In the case of *The Gloria*,¹⁵¹ the Crown asked for the condemnation of this German vessel and part of the cargo. There was a question between the judge and the representative of the Crown concerning 10,875 bags of wheat. The latter relied on the presumption of enemy character of goods found in an enemy ship until the contrary is shown, regardless of the destination of the ship. The judge said that these goods were consigned under bills of lading by an Argentine neutral to a range of ports which might include Hamburg. "The moment documents were produced which showed a neu-

were rendered. In the case of *The Tibor* (France, Civil Tribunal of the Seine, March 4, 1932, Ann. Dig. P.I.L.C. 1931-1932 (London, 1938), pp. 440-441), a Hungarian vessel, seized by the French naval authorities on Aug. 1, 1914, on her arrival at the port of Bordeaux, requisitioned by France, and lost during the war, compensation under Art. 2 of the Vith Hague Convention of 1907 was granted. *Contra: The Minna: Reinhold v. Belgian State*, Brussels Court of Appeals, Jan. 16, 1924 (Ann. Dig. P.I.L.C. 1923-1924 (London, 1933), pp. 452-454); and *The Neckar: L. Littlejohn & Co. v. U. S.* (1926), 270 U. S. 215, Ann. Dig. P.I.L.C. 1925-1926 (London, 1929), pp. 483-484.

¹⁴³ Misc. No. 19 (1925), Cd. 2654.

¹⁴⁴ German yacht *Elwira III*, 1 Ll. P.C. (2nd), 8; the Italian ships *Remo* (*ibid.*, 52), and *Sistiana* (*ibid.*, 55).

¹⁴⁵ *Ibid.*, 49.

¹⁴⁶ *Ibid.*, 1.

¹⁴⁷ *Ibid.*, 12.

¹⁴⁸ See *The Schlesien* (1914), 2 Ll. P.C. 92.

¹⁴⁹ 1 Ll. P.C. (2nd), 9.

¹⁵⁰ The question of cargo was held over also in the case of *The Henning Oldendorff*, 1 Ll. P.C. (2nd), 12.

¹⁵¹ *Ibid.*, 11.

tral, did not the Declaration of Paris arise?" The judge said that the presumption "enemy ship, enemy goods" does not arise in the face of the Declaration of Paris, as it appeared that the bill of lading on its face indicated the property of a neutral. Nevertheless, and without further reasoning, the judge made an order for the condemnation of this part of the cargo, or rather, as it had been sold, against the proceeds.

(11) *Contraband of war*. Contraband of war is always subject to seizure and condemnation, whether on board enemy ships, on board British ships, or on board neutral ships. In order that goods may be classified as contraband of war they must have a certain character and show hostile destination; they must, further, have been declared contraband by the belligerent in question. Whereas in the World War the long-established distinction between absolute and conditional contraband was nearly wholly abolished in fact, and, in some countries, even in law, it is interesting to see that in the present war this distinction is made again. According to the British Contraband Proclamation,¹⁵² Schedule I, the following articles are absolute contraband: all kinds of arms, ammunitions, etc., fuel of all kinds, all articles useful as means of communications, etc., coin, bullion, currency, evidence of debt, metals, etc. Schedule II enumerates as conditional contraband all kinds of foods and foodstuffs, feed, forage, clothing and articles and materials used in their production.

In most cases in which cargo on board British ships was condemned, it was condemned as enemy property and the contraband issue was not mentioned. But in the case of *The Benmacdhui*,¹⁵³ the Crown asked for condemnation of the cargo as enemy property and as contraband: 497 bags of wolfram ore and 250 cases of antimony regulus were claimed to be absolute, and 330 bales of cassia to be conditional contraband, although the Crown admitted that the case concerning cassia "was not very strong." The judge condemned the goods as enemy property, but held that the evidence was insufficient to decide whether they should be condemned as contraband of war. In the case of *The Newfoundland*,¹⁵⁴ on the other hand, the cargo on board this British ship, consisting of 90 cases and 26 cases of canned lobster and 310 bags of lead ore, was condemned as enemy property and as contraband.

In the case of *The Egret*,¹⁵⁵ the cargo on board this British ship consisted

¹⁵² London Gazette of Sept. 4, 1939, p. 6051, reprinted in *C.C.H. War Law Service*, III (Foreign Supp.), 65,552. Identical: contraband proclamations of New Zealand (*ibid.*, 65,555 and 65,605), Canada (*ibid.*, 65,568), but also of France (*ibid.*, 65,554). For Germany cf. Arts. 22-27 of the Prize Law Code, Aug. 28, 1939 (R.G. Bl. I, No. 161, Sept. 3, 1939); but the amendment (*C.C.H. War Law Service*, *op. cit.*, 65,553) follows closely the British contraband proclamation. Britain again instituted the system of "black lists," of the "navicert" and so on, as in the World War. For later developments, see the seizure of German exports (S.R. and O., 1939, No. 1709, Nov. 27, 1939, *C.C.H. War Law Service*, *op. cit.*, 65,557-65,558; French decree, Nov. 28, 1939, *ibid.*, 65,559; Canadian proclamation, Dec. 8, 1939, *ibid.*, 65,585), and the British Extension of Blockade Order in Council, Aug. 1, 1940 (*ibid.*, 65,587-65,588) (so-called "All-Europe" blockade).

¹⁵³ 1 Ll. P.C. (2nd), 6.

¹⁵⁴ *Ibid.*, 10.

¹⁵⁵ *Ibid.*, 10.

of 40 cases of peg wood consigned to Frankfort-am-Main. The representative of the Crown said that peg wood was used in the manufacture of boots: "he could not say whether it was used in connection with boots for the German Army, but it might be used for auxiliary forces." The goods were condemned.

In the case of *The Hawnby*,¹⁵⁶ condemnation was asked of 18 pieces of poplar logs on board this British ship, consigned to Rotterdam. Generally speaking, it is the captor who has to prove before the prize court the hostile destination of goods seized as contraband.¹⁵⁷ During the World War this proof was facilitated by the introduction of new presumptions, both legal and judicial, of hostile destination.¹⁵⁸ In this case the representative of the Crown relied on the absence of claims¹⁵⁹ and on the judicial presumption of hostile destination.¹⁶⁰ The bills of lading showed that, although the goods were consigned to Rotterdam, arrival of the cargo was to be notified to a firm in Düsseldorf, and he suggested that Rotterdam was a convenient port for Düsseldorf. But the prize judge adjourned consideration of the application, holding that proof of hostile destination was insufficient.

In the case of *The Inge Maersk*,¹⁶¹ condemnation of a cargo of petrol on board this Danish neutral vessel was asked prior to the German occupation of Denmark. The ship's papers showed consignment to Hamburg to a "Foreign Tankship Corporation" with directions to notify an enemy, but did not indicate whether the corporation was an enemy or neutral. The cargo was condemned as absolute contraband, as the destination was Hamburg, and in case of absolute contraband documentary evidence of shipment to an enemy port constitutes a non-rebuttable legal presumption of hostile destination.¹⁶²

¹⁵⁶ 1 Ll. P.C. (2nd), 14.

¹⁵⁷ See *The Kim and other vessels* (1915), 3 Ll. P.C. 167: "It is, no doubt, incumbent upon the captor in the first instance to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants."

¹⁵⁸ It is typical of the British conception of prize law to hold: (1) that the "procedure and practice of the prize court (is) a domestic affair, in which no foreign neutral or enemy has any voice or right to interfere" (*The Zamora* (1915), 4 Ll. P.C. 1); and (2) that "as to the modifications and onus of proof . . . these are matters really affecting rules of evidence and methods of proof in this court, and I fail to see how it is possible to contend that they are violations of any rule of international law" (*The Kim* (1915), 3 Ll. P.C. 167). But as the rules of evidence concerning hostile destination and burden of proof are most intimately connected with substantive prize law, the recognition of new legal presumptions by British prize courts and the setting up, by these courts, of new judicial presumptions, constitute, in fact, a change of substantive prize law to the detriment of the claimants. Against this practice are: Kunz, *op. cit.*, p. 187; Verzijl, *op. cit.*, §§30, 111, 451 *seq.*; C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Boston, 1922), Vol. II, pp. 815-817.

¹⁵⁹ An appearance had been entered by the National City Bank of New York, but was withdrawn.

¹⁶⁰ See *The Kim*, *loc. cit.*: "The convenience of Copenhagen for transporting goods of Germany need hardly be mentioned."

¹⁶¹ 1 Ll. P.C. (2nd), 15.

¹⁶² Thus, already, the London Declaration of 1909, Art. 31.

Finally, in the case of *The Alwaki and other vessels*,¹⁸³ condemnation was asked of parts of the cargo of four Dutch and one Norwegian vessels, all neutral, as contraband of war. The representative of the Crown claimed some parts of the cargo to constitute absolute, others conditional, contraband, and relied (1) upon the absence of claims, (2) on consignment to German ports or to Rotterdam, "and Rotterdam is a recognized port for German imports," and (3) on the judicial presumption of central control in Germany over the articles in question,¹⁸⁴ analyzing various German decrees bringing many imports under control and requiring persons importing such articles to report them to a principal association set up by the German Government. The prize judge condemned the goods claimed to be absolute contraband on the evidence of affidavits by witnesses of authority, but stated twice that, while a large consignment of manganese ore was clearly absolute contraband, there were several parcels which "unenlightened, I should never have dreamed were absolute contraband, but which on the evidence I am convinced are such." He condemned the other goods as conditional contraband, following the decision of *The Hakan*, "on the clearest possible evidence of German decrees which impose government control on all these articles and prescribe that they are automatically seized at the moment of coming into the customs house."

¹⁸³ 1 Ll. P.C. (2nd), 43.

¹⁸⁴ This judicial presumption of hostile destination was established during the World War. See *The Kim*, *The Esrom* (1919), 8 Ll. P.C. 492; *The Hakan* (1916), 5 Ll. P.C. 161.

ORGANIZATION OF THE COMMUNITY OF NATIONS

BY CLYDE EAGLETON

Of the Board of Editors

Law, by whatever definition, is the authoritative voice of the community. Whether it be edicted by monarch or dictator, by representative assembly or the whole people, it speaks in the name of and binds the members of the community. It cannot rest upon the judgment of any member of the community; the essence of law is that it performs a group function. Law cannot speak upon the authority of an individual member; it must represent the authority of the group.

The law of the community of nations, developing in the noxious atmosphere of sovereignty and nourished weakly upon a theory of consent, has not been able to speak with a strong voice. It is able to be heard in quiet times, but its voice is drowned out in the roar of dispute and conflict, when it needs to be heard with compelling authority. It is weak because the community of nations is weak. That community has not equipped itself with agencies for stating the law, for rendering judgment based upon the law, for altering a legal *status quo*, for enforcing the judgment of the community. Lacking such organization behind it, the law of nations is unable, in times of stress, to perform its group function.

This has become increasingly true. For some centuries, international law was able to fulfill its purposes with reasonable satisfaction; it was even able to exercise some degree of control over the conduct of war. Its decadence during the first World War, the lawlessness and discontent of the intervening two decades, and its almost complete submergence during the present World War, manifest not so much the decline of international law itself as the appearance of new and tremendous forces, the effect of which is to necessitate reconsideration of the foundations and methods of the law of nations which we have known. A new stage of development has now been thrust upon it by the changed circumstances of modern life, and to these changes it must adjust itself, or abdicate. The international lawyer, too, must adjust himself to these changes. If the law which he practices is to survive, he must seek for it the support of the community within which it functions; he must secure for it the agencies and the authority which it needs. From his post of expert knowledge, he must reveal to statesmen and to peoples what is necessary to make his law effective, and why it is worth while to establish a stronger community organization behind the law of nations.

International law is now blocked in its development by the lack of organization behind it. The customary law of the past, enforced by social pressures, has proven insufficient. The needs of the community are now far

greater, because of the increasing effects of the interdependence of peoples, cumulating slowly but irresistibly since the Industrial Revolution began its leavening effect. The danger to life and property—to independence and territory—are greater, and the community requires not merely the negative function of law and government in affording such protection, but also the positive function of advancing the welfare of the members of the community. Such matters as the exchange of mails, or aerial navigation, or the maintenance of fair conditions of trade between nations, and many others, call increasingly for administrative institutions. These needs have been recognized, to some extent; some such institutions have been established; many others are needed. Behind all such efforts, threatening them and threatening all humanity, is the lowering and cyclonic cloud of war. (The antithesis of law is individual judgment and action contrary to community decision, and when such an individual or national judgment is backed by force, law is helpless—unless it can muster a superior force. War—the use of force by an individual nation—has now become so wide-ranging, so destructive and overwhelming, that international law is doomed unless it can be brought under control. This is certainly one of the greatest tasks which humanity has ever faced.) It must be faced, and human experience gives us no other solution than the use of the combined and organized strength of the whole community against whatever member thereof resorts to force.

As a result of the increasing pressure of these forces of interdependence and war, some experiments have been made in the direction of an organized community of nations. These efforts have been submerged beneath the maelstrom of the present war. They were not strong enough, because peoples had not yet learned that they must uphold the law—that they must not merely obey it, but uphold it against assault. The havoc of the past two decades, culminating in the terrible experience which all are undergoing to-day, must go far toward teaching them that lesson. It is the task of the international lawyer, in the midst of this ruin, to explain the lesson. He must explain to the people and persuade the statesmen that the choice before them now is a world organized by force by some strong man or group, and a world organized by agreement of the community of nations to bring war under force and to make law prevail.) If he wishes international law to survive and prevail, he must build an organization behind it to support and maintain it.

In view of such considerations as those above stated, it is believed that the recommendations of the Commission to Study the Organization of Peace ¹

¹ The Commission to Study the Organization of Peace was organized a few days after war had started in Europe in 1939. It was born in the offices of the League of Nations Association, where it continues to work; but it is not an organization devoted to the restoration of the League. It is convinced that the community of nations must be organized if law and order are to prevail between nations. It is a study group composed of persons able to participate actively in its work, and having some degree of expert qualification therefor; many of its members are members of the American Society of International Law; five of them are

should be of interest to international lawyers. The purpose of this Commission is stated to be "to seek out and state the principles upon which international relations must be reorganized, after the present conflict, if peace is to prevail." This, it is recognized, is largely an ethical problem: "it involves recognition on the part of all peoples, large and small, strong and weak, of the rights of others; a willingness on the part of all to make sacrifices for the general good; a belief in the existence of a power in the world which makes for righteousness."² It is a matter of general knowledge that ("no system of laws and organization can be of value without the living faith and spirit behind and in it.") Whether such a common faith now exists among the peoples of the world may perhaps be doubted; certainly, there was not enough of it to make a success of the League of Nations. This very disaster, however, may arouse the needed feeling. Pain and suffering are the best of teachers, and all over the world today the lesson of past irresponsibility is being accepted. It is because of interminable conflict that law and government appear. Human beings have always, though often slowly, come to the conclusion that it is better to submit to a common law and government than to engage in incessant fighting. The very condition of suffering and discouragement in which we now find ourselves may well lead peoples to the conclusion that submission to an international government is more to be preferred than submission to such terrible wars as the one which insistence upon national independence of action has now brought upon us. It may well be that the economic losses of the past two decades, the vastly increased danger which modern war brings, the destruction and grief which we are now enduring, will impress upon a sufficient number of persons the lessons which similar vicissitudes have taught human beings in the past, and which have led them to ask for and submit to the rule of law and government. Certain principles of moral and social conduct have been universally accepted, as a result of centuries of human experience; it may be that recent experiences will have taught many people that these principles must now be applied to international relationships. There is much evidence to show that such an attitude is now developing in the United States. Various polls reveal general realization of the fact that the United States cannot isolate itself from war or economic loss; and many persons have expressed regret that we did not support the League of Nations, or, independently of that institution, now demand that there be an international police to stop aggressors.

This trend—and it is clearly a trend—results naturally from increasing

members of the Board of Editors of this JOURNAL. It maintains contact with other countries making studies in this country and abroad, and seeks to be a clearing house for information in the field of international post-war reconstruction.

² Commission to Study the Organization of Peace, *Preliminary Report*, November, 1940, Eight West Fortieth Street, New York City. Reprinted, with accompanying papers presented to the Commission, in *International Conciliation*, April, 1941, No. 369.

knowledge, driven home by our suffering, of the changed character of the world in which we live. The Preliminary Report of the Commission speaks of the changes wrought by science, changes which have annihilated time and space, and of the exploration of the world, leaving no new lands to which one may migrate. "Man cannot build civilization in new lands. He must stand and face his problem where he is." Though there may be few more land frontiers, there are plenty of other frontiers to challenge us. During a period almost coincident with the life of the United States, the effects of the Industrial Revolution have been cumulating, and now "geographical division of labor has created economic dependence of one people upon another, rendering each vulnerable to starvation or industrial disorganization by blockade and trade restrictions." This same scientific development and economic interdependence has changed the character of war and made it totalitarian. If a nation must put itself upon a totalitarian basis in order to fight a war, it must for that purpose surrender many of its purposes and beliefs; and if war is to continue in the world, then nations must remain upon a totalitarian basis in order to be prepared for the next war. War itself has become "all-consuming and all-destructive," and human nature thus has been harnessed to destruction, rather than devoted to human advancement. "Only by organization to uphold the law of nations can civilization stand up against the ever-advancing machinery of modern scientific warfare . . . and that law can be enforced only if the power of the community, overwhelmingly greater than the power of any of its members, is brought to bear when and where lawlessness begins."

With such an increasingly anarchic and insecure world as this, no one can be content. "Man will continue to want from this world freedom, social justice, economic and political security. He wants a world in which human intelligence will organize and distribute the ample resources of nature so that all can live abundantly; a world in which human intelligence will be devoted to human progress rather than to destruction; a world in which a man's labor may be directed toward his advancement."

It is a fact of some significance that most of the proposals for post-war settlement, and particularly those emanating from England, emphasize social justice. Peace proposals of the past have envisaged the sovereign state, rather than the individual; those of today seek not merely to provide machinery through which sovereign states may act, but to provide also a system within which national governments will be enabled to advance the welfare of the persons within each. The state, say the democracies, exists for the benefit of the individuals within it; it is an agency of service, and not an object of worship. On the one hand, then, the individual is entitled to look beyond the state when—as has now proven to be true—the state is unable alone, in an interdependent and war-torn world, to care properly for the needs of its citizens. On the other hand, if the welfare of the individual is the primary object, the international order must also keep this in mind and must

organize itself so as to be able to protect and advance his interests. Social justice is an important part of most current plans for the reorganization of the international order; and its meaning and attainment involve difficult relationships between the international system and the domestic order of each state. It may prove impossible to secure fair international conditions of trade if within one state a small group is able to insist upon high tariffs; it may be impossible to secure loyal support for the international system within a certain state if those in power in that state are able to control information and education and shape it toward their own selfish purposes. In the building of an international order of peace it will be true, as it is now proved to be true in war, that many problems will have unsuspected international interrelationships, and that the achievement of social justice, or higher standards within one state, will depend upon what is done within another state.

"Peace," says the Preliminary Report of the Commission, "cannot be a static condition of life achieved by renunciation of war, nor a mere pious desire to live at peace; it must be a dynamic and continuous process for the achievement of freedom, justice, progress and security on a world-wide scale." Peace, it continues, requires the substitution for war of international processes which will protect against violence and promote creative changes; it involves whatever organization is necessary to promote the progress of mankind. The peace movement, it may be noted in this connection, has long been stultified by the belief—which apparently still continues in a few groups—that peace is merely the absence of war. Such an attitude leaves out of consideration the price which must be paid in order to secure this absence of war. That price is the organization of the community, and the willingness of each member of the community to contribute his share of effort and, if need be, of blood to uphold the law of the community. Peace means government, and a government which does more than merely restrain the aggressor from the use of force; if peace is to be substituted for war, then it must be able to secure justice and to advance the interests of those to whom it denies the use of war.

The alternatives which face the world today are "world empire, achieved by conquest, or some form of association, such as world federation, achieved by consent." Historical experience condemns the former; the world cannot be permanently organized upon such a basis. The issue today is between overpowering militarism and the organization of peace: "the alternative to organization by conquest is organization by consent." It is idle to think that in a world in which force exists, it will not be picked up and used by someone. It is our task to see that it is used, not by selfish individuals or nations, but by the community in support of law and justice. The lesson taught us by the aggressors of today is convincing: if the community of nations cannot voluntarily and reasonably agree upon a system which can monopolize the use of force, then force will be used by some person or nation

to impose upon all a "new order" in which subjugated peoples will have no voice.

The state has long been the unit of the society of nations, and will doubtless continue to be so regarded. It does not follow from this, however, that the state shall be permitted unlimited and unlicensed freedom of action, including the right to impose its will by war upon weaker states. Organization to make international law effective has long been hampered by "exaggerated developments of the idea of sovereignty." The organization of international society which can best hope for success "will be that one which will assure a dynamic peace with the minimum sacrifice of national sovereignty." It is clear that the sovereign state which now "claims the power to judge its own controversies, to enforce its own conception of its rights, to increase its armaments without limit, to treat its own nationals as it sees fit, and to regulate its economic life without regard to the effect of such regulation upon its neighbors" must have some limitations put upon this anarchic freedom. The Commission suggests the following limitations on sovereignty:

- (a) Nations must renounce the claim to be the final judge in their own controversies with other nations and must submit to the jurisdiction of international tribunals. The basis of peace is justice; and justice is not the asserted claim of any one party, but must be determined by the judgment of the community.
- (b) Nations must renounce the use of force for their own purposes in relations with other nations, except in self-defense. The justification for self-defense must always be subject to review by an international court or other competent body.
- (c) The right of nations to maintain aggressive armaments must be sacrificed in consideration for an assurance of the security of all, through regional and world-wide forces subject to international law and adequate to prevent illegal resorts to international violence.
- (d) Nations must accept certain human and cultural rights in their constitutions and in international covenants. The destruction of civil liberties anywhere creates danger of war. The peace is not secure if any large and efficient population is permanently subject to a control which can create a fanatical national sentiment impervious to external opinion.
- (e) Nations must recognize that their right to regulate economic activities is not unlimited. The world has become an economic unit; all nations must have access to its raw materials and its manufactured articles. The effort to divide the resources of the world into sixty economic compartments is one of the causes of war. The economic problem arising from this effort has increased in gravity with the scientific and industrial progress of the modern world.

It is obvious that these limitations upon national sovereignty could not be achieved except through a powerful international government. There must be machinery and authority to compel a nation to submit its claims to adjudication; we have seen recently how a nation may put forward fanciful

and unsubstantial claims as a basis for violent expansion. To prevent the use of force, and to deprive a state of its armaments calls for a physical strength obtainable only through the combination of the resources of the community; it calls also for the means and power to repair injustices for which, until now, the community has provided no means of repair other than war. If a people have now no other means than war for protecting their interests and securing justice, the community cannot deprive them of this means without at the same time providing justice through the agencies of the community. This is especially true in the economic field, which international interdependence has now made the source of many injustices and even dangers. There must even be some sort of a Bill of Rights, if human beings rather than states are to be served by political organization; and this implies a certain degree of control by the international order as between states and their own citizens.

The Commission summarizes briefly the institutions needed:

- (a) An international court with jurisdiction adequate to deal with all international disputes on the basis of law.
- (b) International legislative bodies to remedy abuses in existing law and to make new law whenever technical progress requires the adjustment of international practice.
- (c) Adequate police forces, world-wide or regional, and world-wide economic sanctions, to prevent aggression and to support international covenants.
- (d) International machinery with authority to regulate international communication and transportation and to deal with such problems as international commerce, finance, health, nutrition and labor standards. . . .
- (e) Appropriate authorities to administer backward areas ceded to the world federation. Such administration should give precedence to the interest of the inhabitants of the area, looking to their eventual self-government; should assure all nations equal economic opportunity within the area; and should facilitate colonization and economic development of areas suitable for that purpose without injury to the native inhabitants. International corporations might well be encouraged to enlist world-wide support for the constructive task of developing such areas under supervision of such authorities.

The Preliminary Report of the Commission does not develop further these broad principles, intended as guides for subsequent study; it has made no effort, thus far, to lay down a blueprint for the institutional structure. It recognizes that the international system should be a universal one, though within it there may well be regional subdivisions. The League of Nations is credited with the successful performance of many tasks but "the present conflict has taught us that something at once stronger and more adjustable than the League of 1919 is necessary." The system roughly sketched in this Report moves toward federation, but regards the development in this direction as evolutionary, rather than the definite break with the past which

the author of *Union Now* regards as necessary. "The world must evolve from League to federation." It has usually been true, in history, that new political institutions have evolved from those of the past; there have been few, if any, cataclysmic breaks with the past. "Just as the League grew out of the development of international law and uncoordinated institutions, so world federation will grow out of the experience of the League, the World Court and the International Labor Organization."

The Eight Point Program agreed upon by President Roosevelt and Prime Minister Churchill on August 14, 1941, known as the Atlantic Charter, was regarded as an initial official step of great importance by the Commission, which issued a Comment upon it.³ This comment approved the Atlantic Charter as moving generally in the right direction, though with important omissions and with some possibilities of misinterpretation.

The Commission warns that Point One should not be interpreted as an effort to maintain the *status quo*; it warns also that the implied surrender of a right of conquest must mean more than a mere inexpensive self-abnegation—it must mean real coöperation with those countries which might feel a need of aggrandizement, in comparison with the British Nations and the United States, who do not feel such a need now. As to Points Two and Three, the Commission regards a right of self-determination as impracticable, and the determination and maintenance of territorial frontiers as insoluble "except through an international authority having power to decide and enforce." Similarly, there must be such an international system "to determine who are the people who can choose their form of governments, to enforce their right to choose, to prevent dictators or outsiders from interfering with that right, and to prevent the exercise of that right from doing injury to other members of the community." The phrase, "sovereign rights," has unfortunate connotations. As a matter of fact and of logic, the subsequent Points of the Atlantic Charter would be impossible of realization if the old sovereign rights were restored without diminution. If there is to be any substance to the Charter, or any hope for law and order in the world, Point Three must not be interpreted so as to put the will of a national sovereignty above that of the community of nations.

Points Four, Five and Six are important and far-seeing. Like the *Preliminary Report of the Commission to Study the Organization of Peace*, and like other studies of similar purpose, they demand a better situation and opportunity for the individual human being. As the Commission comments, a continuing and powerful international organization will be necessary in order to make these objectives attainable. Point Four, which calls for a better system of international trade, would mean an important change in American policy. That the Government of the United States takes it seri-

³ *Comment on the Eight Point Declaration of President Roosevelt and Prime Minister Churchill, August 14, 1941.* Commission to Study the Organization of Peace, New York, December, 1941.

ously is shown by a forceful speech made by Under Secretary of State Welles on October 7, 1941, in which he says, "The basic conception is that your government is determined to move toward the creation of conditions under which restrictive and unconscionable tariffs, preferences and discriminations are things of the past; under which no nation should seek to benefit itself at the expense of another; and under which destructive trade warfare shall be replaced by coöperation for the welfare of all nations."

If the phrase "with due respect for their existing obligations," in Point Four, is to be interpreted to tie us down to vested interests of the past, the meaning of this point, and indeed of all eight points, would be destroyed. The dead hand of the past cannot be permitted to constrict the necessary reconstruction of the future. Point Five, the Commission points out, is a recognition of the fact, above suggested, that "no state alone is able adequately to advance the welfare of its members." As to Point Six, which asks for security against war, the Commission asserts that "the defeat of the Nazi régime is a prerequisite to any advance toward international order," but it is only a prerequisite, and not an achievement of that order. "The mere threat of war in its modern character necessitates totalitarian war at the expense of democracy . . . no one state is capable of protecting its citizens against this menace; each must turn to the collective action of the community of nations for support," and this means "a strong international government, with the physical power to defeat any attempt at aggression."

Point Seven, with regard to freedom of the seas, is regarded by the Commission as of minor importance "because its realization depends upon the ability of the community of nations to bring war under control." If the larger problem of war could be solved, navies would disappear, and with them the difficulty of keeping the seas open. It is noted, too, that Britain and the United States have been the greatest naval powers, and that the restrictions implied in this article would therefore be largely addressed to them. There must, of course, be freedom of movement upon the seas for international trade and intercourse, but it must be under international regulation. Without such regulation, freedom of the seas could mean abuse of a right.

Point Eight calls for the abandonment of the use of force and for the disarmament of aggressive nations. The Commission notes that security calls for much more than the wishful thinking of which the American people have recently been guilty; "it calls for an international system strong enough to protect those states which have disarmed and to provide justice for them." The Commission comments with appreciation upon the use by the two statesmen of the word "spiritual":

There is a widespread conviction that disregard for fundamental moral principles led to the present conflict, and that for its solution we must return to those principles.

The Atlantic Charter appeals to the most powerful force in humanity,

the spiritual forces; a program such as it sets forth cannot fail to win the support of all men. Its emphasis is properly upon such ideals, for machinery alone is not enough; such machinery must have behind it the power of popular support and the directive force of ideals. On the other hand, machinery is necessary to put these ideals into effect, and it must be made clear to the peoples of the world, and particularly to the American people, that their hopes can not be achieved unless they are willing to establish and uphold an international system.

A Second Report,⁴ dealing with the transitional period to follow the war, has now (February, 1942) been issued by the Commission. It begins with the assertion that we cannot hope to return to normal, *i.e.*, previously existing, conditions as soon as the shooting stops; it observes that "not only war, but social revolution is going on round about us, and the dynamic forces of human and international development cannot be dammed at the year 1939." Because of the greater range and destructive power of this war, the task of reconstruction will be far greater than ever before, and it will be further complicated by the demand for a better social and economic system. Further, "the moral principles upon which law and order were built, whether national or international, are no longer secure; foundations must be laid or restored, and this must be done during the transitional period." The solutions to be found must this time be something more fundamental than reparations, or Red Cross succor for the starving, or reckless investment.

The Commission suggests that the traditional method of ending war—by armistice, peace conference and treaty followed by ratification—is no longer adequate. "According to international law, no transitional period is recognized; technically, the war continues until the treaty of peace goes into effect." This method resulted, after the last World War, in holding under arms millions of discontented men, in the continuation of a harsh blockade, in enormous financial loss and great unhappiness—mistakes which should not be repeated. It has always been difficult to say when war begins and when it ends; it is even more difficult with modern war. "It is quite possible that this war will end in segments, at different times and in different places; it may not end at all in the old sense of formal cessation. If nations must continue upon a totalitarian basis, in order to prepare for the next war, it may be impossible ever again to speak of peace time." However the war may come to an end, we should be prepared to meet the situation which will then confront us.⁵

That situation is sure to be a tragic one. Famine and disease will be on the march, and agencies for combating them will have broken down; terrible forces of revenge and lust for power and hunger and desperation will be loosed, and civil disorder will everywhere be menacing; nations will suffer from economic collapse from which none, unaided, can rescue itself; millions

⁴ Commission to Study the Organization of Peace, *Second Report: The Transitional Period*, February, 1942. Reprinted, with papers presented to the Commission, in *International Conciliation*, April, 1942, No. 379.

of peoples will have been uprooted and flung helter-skelter by the waves of war; there will be derelict colonies, social insecurity, false indoctrination to combat. Above all, and through all, will be the weakness of the political order.

In the viewpoint of the Commission "the responsibility for the reconstruction of the world will rest upon the victors, whether they like it or not, and whether anyone else likes it or not." In this situation, alternative dangers are to be feared; on the one hand, that the victors may refuse to exercise the authority which victory has given them; on the other hand that, if they do assume the burden and successfully administer the tasks of the transitional period, they may not be willing, when stability has been restored, to relinquish their position of power. These dangers may be met, it is suggested, if in advance of the termination of hostilities plans and agencies have been made and pledges assumed, to carry out the tasks of the transitional period and then to establish a permanent system of world order. The Commission regards the establishment of the United Nations, based upon the Atlantic Charter, as a step in this direction. It emphasizes that, though decisions will in fact be taken by those who have the power to act, the states exercising this power "must behave, not as victors have in the past, but as a police power acting in the name of the community of nations." The victor nations will rest under the heavy suspicion which history attaches to victors; they must make it clear that they seek no especial political or material advantage, and must leave no doubt of their intention to turn over their powers to institutions created and maintained by the community.

It is of the greatest importance that the victors establish their sincerity of purpose during this period, and also that they prove their ability to handle the international tasks of the transitional period. On the one hand, the lesson of defeat must be taught: "it must be demonstrated convincingly that those who invoked force in violation of their obligations to a world order were destroyed by the inherent capacity of the world order to invoke a greater force in its own defense." On the other hand, there must ultimately be established within the community an organization and control based upon consent. It will be a very difficult period, and ultimate success in establishing a permanent organization based upon agreement will depend largely upon the sincerity of purpose of the victors. They will have no time, when the armistice call (if any) is sounded, for setting up machinery and making plans; all this should have been done before that time. The effort must be begun now, the plans must be laid, the agencies prepared, commitments taken so that they will not be forgotten, long before the conflict ceases. The Commission believes that some of the joint agencies for conduct of war could, and probably will, be carried over into the tasks of reconstruction, and that some can and should be carried over into a permanent world order. It regards this as a continuing development which should be encouraged, and for this reason calls the attention of students to the development of the agencies

of the United Nations. If united effort should be attainable for the effort of war, which we hate, it should be available for the maintenance of peace, which we desire. If we are able to set up institutions for the combined action in war of those who are opposed to aggression, we should be able to continue the development of those institutions into a permanent system to uphold law and order in the world. It is unnecessary, and undesirable, to have such a break in development as occurred after the last World War, bringing with it a reversal of psychology and a period of conflict and shouting over the principles and methods of reconstruction.

The Commission concludes that a number of efforts should be undertaken at once. First, "the peoples must be made aware of the size and difficulty of the tasks which await the victors upon the end of fighting, and of the responsibility which will belong to these peoples. They must know that these tasks are unavoidable and that the responsibility cannot be escaped." Preliminary studies, both official and private, should be undertaken at once, and technical organizations to deal with such problems as health or food supply or education should be created or strengthened in preparation for the tasks. The work of such institutions will depend upon the maintenance of order in the world: "Long before the transitional period begins, the United Nations who have declared themselves opposed to aggression and interested in the establishment of law and order should have consulted among themselves and agreed upon a strong and unified directorate having the authority to coördinate the work of the various technical organizations and to command the necessary services, and having military strength sufficient to maintain order everywhere." Even though the power during this period belongs as a matter of fact to the victors, or to certain of the victors, they must make it clear that they are working in the interest of the community, that "the power which they exercise is a temporary one forced upon them by circumstances, and that they intend to transfer this power as soon as it can be done to institutions of the organized community of nations." It is to be hoped that, through this procedure, enough order will have been restored, both within and between national governments, so that it will be possible within a few years to ascertain opinion and to have stable governments which can participate in the building of a permanent world order. When sufficient stability has been restored, a conference of all nations, defeated or otherwise, should be called to create the world order. "The provisional organization, however, should not transfer its powers, nor should frontiers or governments be finally recognized, until the institutions of the permanent order are confirmed and functioning."

How long this process will require it is impossible to say. The Commission regards such a period of control as essential, "so that there may be time for careful thought, for experimenting and testing, for the rebuilding of national governments, the formation of public opinion, the discovery of what peoples want, after their sufferings, in the way of a permanent settlement."

The urgency of these matters, upon which the Commission insists, will be recognized by international lawyers. The law of nations cannot be improved and strengthened, as it must be, upon a day's notice, nor in the atmosphere of conflicting national interest and tense necessity for decision which pervade the halls of the old type of peace conference. Nor can it hope for sufficient strength in the future unless there is built behind it an organization of the community of nations which can support it with the strength *omnium contra unum*. These things require time and study and effort. They can not be laid aside while we win the war; they are, in fact, part of the winning of the war. The general on the battle-field, no matter how bitterly he is engaged in battle, must always be looking ahead and planning for the situation which will confront him when his victory has been won. He can not let down, take a rest, and then leisurely calculate what is to be done next. He must be ready to consolidate his position when the action is finished, else he may find that his gains are lost. This, in effect, was the result of the last World War. We did not consolidate our victory then into a secure peace, into an efficient support for international law. That mistake should not be repeated, and the development of the United Nations, as well as reports of popular attitudes, seem to indicate a determination not to repeat it after this war. The task of study, of planning, of leadership in the rebuilding of the law of the community of nations belongs primarily to international lawyers; and it involves necessarily study of the organization of the community of nations.

JOINT ACTION TO PROTECT AN AMERICAN STATE FROM AXIS SUBVERSIVE ACTIVITY¹

BY WILLARD BUNCE COWLES

In all three consultative meetings of American Foreign Ministers held since 1939, the American governments have officially recognized the threat of Axis psychological warfare and the possible need of meeting this danger with strong counter measures.² As the war has progressed it has become increasingly evident that the independent existence of the American states might well be at stake if this problem is not effectively solved. The Panama meeting (1939) recommended that the American governments "take the necessary measure to eradicate from the Americas the spread of doctrines that tend to place in jeopardy the common Inter-American democratic ideal"; the Habana meeting (1940) made it mandatory that each government take all necessary measures to prevent and suppress such activities; and the Rio de Janeiro meeting (1942), reaffirming prior determinations in the matter, provided for the creation of a body, known as The Emergency Advisory Committee for Political Defense, to study and coördinate such measures.

The problem has not yet been solved and it may be presumed that Axis groups will continue their undercover hostilities against the "United Nations" in this hemisphere. We may expect continued organized espionage, sedition, sabotage, totalitarian propaganda, and overt acts preparatory to military action against the American states. The Rio consultative meeting (1942) frankly stated that "acts of aggression of a non-military character, including systematic espionage, sabotage, and subversive propaganda are being committed on this continent, inspired by and under the direction of member states of the Tripartite Pact and states subservient to them, and the fate of numbers of the formerly free nations of Europe has shown them to be both preliminary to and an integral part of a program of military aggression."³

It is possible that some American country might, under Axis pressure or domination, become a focal base of operations for extensive subversive, or even more serious, activities against other American states. It is not impossible that pro-Axis elements, under Axis influence and support, might

¹ The opinions expressed herein represent only the personal views of the writer.

² Panama Resolution XI, Final Act, Dept. of State Bull., Oct. 7, 1939, p. 331; Habana Resolutions II, III, V, VI, VII, Final Act, Dept. of State Bull., Aug. 24, 1940, pp. 130-134; Rio de Janeiro Resolutions XVII, XVIII, XIX, Final Act, Dept. of State Bull., Feb. 7, 1942, pp. 128-132. These Final Acts are also printed in this JOURNAL, Supplement, as follows: Panama (1939), Vol. 34 (1940), pp. 1-20; Habana (1940), Vol. 35 (1941), pp. 1-32; Rio de Janeiro (1942), this number, pp. 61-95.

³ Final Act, Dept. of State Bull., Feb. 7, 1942, p. 128.

gain complete control of an American government. If these possibilities should materialize and if Axis activities were successfully concentrated and effectively carried out in the territory of an American state, they might well, under present conditions, constitute a serious danger to the other American states, even to a point of jeopardizing their existence.

Under Secretary of State Welles has declared that all the American Foreign Ministers at the Rio (1942) meeting realized that "drastic and concerted measures" must promptly be taken for the common safety of all the American Republics;⁴ and, with specific relation to subversive activities, those Foreign Ministers asserted that they were determined "to give the fullest coöperation in the establishment and enforcement of extraordinary measures of continental defense."⁵ The peoples of the twenty-one American countries (however reluctantly) are compelled to face the possibility that an extreme subversive situation may develop in which the government of an American state may become entirely Axis controlled and in which the only effective action of a consultative meeting would be to order something far more drastic than a mere protest to a government or the publication of facts. Forcible defensive action might be required forthwith in order to safeguard the very existence of the state concerned, the consulting parties, and the hemisphere as a whole. It could hardly be expected that the American states would stand idly by and permit such a dangerous situation to continue.

If a grave condition of this character actually has to be faced squarely by the American states, it should be dealt with in accordance with the usual

tenance of Peace at Buenos Aires in 1936, which is denominated the Convention for the Maintenance, Preservation and Reestablishment of Peace.⁷ Its most forceful implement is the Declaration of Lima, which may properly be construed as being in the nature of a protocol to that convention.⁸ In it the American Governments declared:

First. That they reaffirm their continental solidarity and their purpose to collaborate in the maintenance of the principles upon which the said solidarity is based.

Second. That faithful to the above-mentioned principles and to their absolute sovereignty, they reaffirm their decision to maintain them and to defend them against all foreign intervention or activity that may threaten them.

Third. And in case the peace, security or territorial integrity of any American Republic is thus threatened by acts of any nature that may impair them, they proclaim their common concern and their determination to make effective their solidarity, coördinating their respective sovereign wills by means of the procedure of consultation, established

⁷ "Article I.—In the event that the peace of the American Republics is menaced, and in order to coördinate efforts to prevent war, any of the Governments of the American Republics signatory to the Treaty of Paris of 1928 or to the Treaty of Non-Aggression and Conciliation of 1933, or to both, whether or not a member of other peace organizations, shall consult with the other Governments of the American Republics, which, in such event, shall consult together for the purpose of finding and adopting methods of peaceful coöperation.

"Article II.—In the event of war, or a virtual state of war between American States, the Governments of the American Republics represented at this Conference shall undertake without delay the necessary mutual consultations, in order to exchange views and to seek, within the obligations resulting from the pacts above mentioned and from the standards of international morality, a method of peaceful collaboration; and, in the event of an international war outside America which might menace the peace of the American Republics, such consultation shall also take place to determine the proper time and manner in which the signatory states, if they so desire, may eventually coöperate in some action tending to preserve the peace of the American Continent." (51 Stat. 15, 18; U. S. Treaty Series, No. 922; 4 Treaties, etc. (Trenwith, 1938), 4817, 4819; this JOURNAL, Supplement, Vol. 31 (1937), p. 53.)

⁸ The Declaration of Principles of Inter-American Solidarity and Coöperation, signed at Buenos Aires at the same time as the convention, seems clearly to be of such a nature. Sec. 2 of this declaration provides that every act susceptible of disturbing the peace of America justifies the initiation of the procedure of consultation "provided for in the Convention for the Maintenance, Preservation and Reestablishment of Peace, signed at this Conference." (Report of the Delegation of the United States of America to the Inter-American Conference for the Maintenance of Peace, Dept. of State Pub. No. 1088 [Conf. Series No. 33], pp. 227, 228.) The Declaration of Lima is the lineal successor to the Declaration of Principles of Inter-American Solidarity and Coöperation.

Some idea of the binding nature of the Declaration of Lima emerges from the practical fact that, since its enunciation, there has been unanimous response to all calls for meetings of Foreign Ministers, as provided for therein. It may be noted too that Assistant Secretary of State Berle pronounced the declaration "a solemn and binding covenant." (Dept. of State Press Releases, Mar. 11, 1939, pp. 167, 168.) For certain observations on the legal effect of declarations, see 27 Am. Bar Assn. Jour., 342, 348-349 [1941]. See also *Rules of Land Warfare* (1940 ed.), par. 26, p. 8.

by conventions in force and by declarations of the Inter-American Conferences, using the measures which in each case the circumstances may make advisable. It is understood that the Governments of the American Republics will act independently in their individual capacity, recognizing fully their juridical equality as sovereign states.

Fourth. That in order to facilitate the consultations established in this and other American peace instruments, the Ministers for Foreign Affairs of the American Republics, when deemed desirable and at the initiative of any one of them, will meet in their several capitals by rotation and without protocolary character. Each Government may, under special circumstances or for special reasons, designate a representative as a substitute for its Minister for Foreign Affairs.⁹

The Declaration of Lima thus provides that, in order to effectuate American solidarity, a consultative meeting can employ such measures as are advisable under the circumstances of particular cases. Though no express limitation is placed upon the nature of the measures which can be used or the method of their application, implied ones exist.

The consultative institution was designed to deal only with matters of utmost concern to the hemisphere. The primary function of consultative meetings is to deal with real and vital inter-American emergencies, not local ones. The specific matters upon which there is agreement to consult relate primarily to matters of united action in the face of aggression. With regard to disputes between the American states themselves, the general objective of consultation is to afford an inter-American procedure to expedite settlements on their merits, in accordance with the inter-American peace machinery.

Under the Convention or the Declaration of Lima, or both, interim measures or provisional remedies of temporary duration can be ordered. The operating period of such measures would not appear to extend, at most, beyond the time of the final determination of the relevant matter on its merits. It seems clear, however, that control is coextensive with the emergent conditions which gave rise to the consultative action. The authority of a consultative meeting, though chiefly mediatory, is designed to be, and is, inherently strong, given a sufficiently grave situation and a united will to use it. Indeed, if there is a sufficient determination effectively to use the new system, a consultative meeting can exercise enormous power¹⁰ in dealing col-

⁹ Final Act, Eighth Int. Conf. of Am. States (1938), pp. 115, 116; Report of the Delegation of the United States of America to the Eighth Int. Conf. of Am. States, Dept. of State Pub. No. 1624 [Conf. Series No. 50], pp. 189, 190; this JOURNAL, Supplement, Vol. 34 (1940), p. 199.

¹⁰ The recent settlement of the century-and-a-quarter-old Ecuadorian-Peruvian dispute at the Rio consultative meeting is a good illustration of this. Even though the matter was not on the agenda, it was dealt with in a highly successful manner. Under Secretary of State Welles has described the results, in part, as follows: "As you all know, that long-standing controversy had time and again given rise to the most serious difficulties between those two neighboring republics. Tragically enough, it had even resulted in actual hostilities last year. It had for generations thwarted and handicapped the prosperous development and the peaceful stability of the two nations involved. Its continuation had jeopardized the

lectively with defensive matters, even though its action be merely interlocutory. At the very time the new system was created at the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936), Dr. Felipe Barreda Laos, a Peruvian delegate, speaking shortly after Secretary Hull, pointed out that the procedure of consultation not only implied "the defense against the dangers of European conquests and of American wars, but also that corollary which years ago brought such alarm: the corollary of the policing of the American Continent. Now the international policing of America is not entrusted to a single country; the international policing of America is entrusted by this treaty to all of us; it is the whole Continent which asserts its faith, its confidence in its own powers, resources and capacities to defend its own countries against the possibilities of internal and external wars."¹¹

To strike specifically at subversive activities, the procedure of consultation can be invoked under several inter-American instruments. In the Declaration of Lima (*supra*) the American states declared that they would make their solidarity effective in case the peace, security, or territorial integrity of any American Republic was threatened. In the situation here envisaged the security and territorial integrity of many, if not all, the American states definitely would be gravely threatened.

Resolutions VI and VII of the Habana Consultative Meeting are even more specifically in point. Resolution VI stipulates that each government "shall" adopt measures "to prevent and suppress any activities directed, assisted or abetted by foreign governments, or foreign groups or individuals, which tend to subvert the domestic institutions, or to foment disorder in their internal political life, or to modify by pressure, propaganda, threats, or in any other manner, the free and sovereign right of their peoples to be governed by their existing democratic systems." Among many other specific matters related to subversive activities, Resolution VII recommends the

well-being of the entire hemisphere. I am happy to say that since the signing of the agreement the arrangements provided therein have been scrupulously carried out by both parties thereto, and it is the hope of all of us that the remaining and final steps will be taken in the immediate future, so that this last remaining important controversy in our hemisphere may be regarded as finally liquidated." (Dept. of State Bull., Feb. 21, 1942, pp. 164, 166.) An English translation of the agreement (Protocol of Peace, Friendship, and Boundaries) appears in *id.*, Feb. 28, 1942, pp. 194, 195-196. It is a noteworthy document, which states that it is signed "under the auspices" of the President of Brazil and "in the presence of" the Ministers of Foreign Affairs of Argentina, Brazil, and Chile and the Under Secretary of State of the United States. The execution of the Protocol is stated to be under the "guarantee" of these four countries which will cooperate in adjusting the occupation and retirement of the troops (by means of military observers), assist in resolving doubts or disagreements which may arise in the execution of the Protocol, and collaborate in minor rectifications of the boundary line to be fixed. The Protocol is accordingly signed, not only by the representatives of Ecuador and Peru, but by representatives of the so-called ABC Powers and the United States.

¹¹ Proceedings, pp. 90-91.

adoption of effective prohibitions of every political activity by foreign individuals, associations, groups or political parties, no matter what form they use to disguise or cloak such activity; rigorous supervision of the entry of foreigners into national territory, particularly in the case of nationals of non-American states; effective police supervision of the activities of foreign non-American groups established in the American states; and the creation of an emergency penal system.¹² Both resolutions provide for consultation. The Rio meeting (1942) specifically reaffirmed these resolutions, and asserted that the American governments would "prevent individuals or groups within their respective jurisdictions from engaging in activities detrimental to the individual or collective security and welfare of the American Republics."¹³ The recommendations of this resolution are stated to have been adopted "according to Resolution VII of the Habana Meeting," which, as just noted, provides for consultation.

The two Habana resolutions are unusual. Their significance can best be seen against the following background: The fundamental basis of Pan American resolutions, which since 1889 have usually taken the form of recommendations, is that the states are free to act upon them to such an extent as they may see fit. If they do not act at all there is no basis for complaint. This is true of the ordinary recommendations of the new consultative meetings, even though they deal primarily with urgent matters. Inter-American resolutions, even today, are seldom mandatory. Up to the point where the ordinary instrument takes the form of a "treaty" or a "declaration," the understanding has been, and still is, one of "states rights."

But the substantive provision of Resolution VI of Habana is not a mere recommendatory one. It is mandatory. It provides that, within its constitutional powers, each government "shall" adopt all such necessary measures. Quite apart from its form, the nature of the commitments puts this resolution into a broad class of international agreements or *acuerdos*. Again, though it relates to subversive activities directed toward the domestic institutions and the internal political life of particular American states, it expressly declares that all American states are equally concerned and responsible for the security of the hemisphere, as that security may relate itself to such activities.

Resolution VII of Habana is not mandatory, but it stands unique among all other such inter-American instruments as it is the only inter-American recommending resolution which provides for the initiation of the procedure of

¹² Final Act, Dept. of State Bull., Aug. 24, 1940, pp. 132, 133-134.

¹³ Resolution XVII, Final Act, Dept. of State Bull., Feb. 7, 1942, p. 128. This resolution also contains a recommendation that the Governments of the American Republics, within their respective national jurisdictions, take control of the activities of "organizations directed or supported by elements of non-American states which are now or may in the future be at war with American countries, whose activities are harmful to American security; and proceed to terminate their existence if it is established that they are centers of totalitarian propaganda." (*Id.* at 129.)

consultation. And, unlike its substantive provisions, the consultative stipulation in this resolution is in the nature of a grant, not a recommendation.¹⁴ The apparent meaning of this consultative stipulation seems to emerge from the following considerations: Domestic regulation of the matters are only "recommended." The recommendations may or may not be effectively carried out by particular governments. But if one American country is affected sufficiently by an omission of another to curtail subversive Axis activities, its government can initiate the procedure of consultation, for such joint action as may be taken in the matter. In short, Resolution VII is a recommendation coupled with an enabling provision, permitting other governments to do something about the matter. The nature of these two instruments is thus in sharp contrast to the usual inter-American recommending resolution.

If the existence of an American state is actually in the balance and the other states are gravely menaced, these two Habana resolutions, together with their Rio successor, afford a strong and broad basis for consultation.¹⁵

If the situation were critical enough to cause a consultative meeting to agree to any extreme action, the people of the state concerned would, in all probability, welcome it in their own self-defense, even if they were so completely controlled by an Axis Power that they themselves could not invoke the consultation. But the then-existing Axis-dominated government presumably would not. This possibility must also be frankly recognized. Moreover, such a government would presumably attempt to use the inter-American system for its own ends. It might assert that any consultation whatever on the matter, any order of the consultative meeting, or any effectuating act, was an "intervention" and a violation of the Additional Protocol

¹⁴ Though not pertinent to the subject hereof, it may be observed that the differing nature of the various provisions of these two resolutions serves to illustrate the proposition that the effect of all inter-American resolutions should not be assumed facily, on principle, to be the same. It suggests that each should be studied separately. There is little doubt that even ordinary inter-American "resolutions" are designed to, and do, create some sense of commitment. A clear inference as to the degrees of obligation emerges in the technique employed in Sec. 3 of Resolution XVII, adopted at the Rio de Janeiro meeting, in relation to the attachment thereto of a "Memorandum on the Regulation of Subversive Activities," Final Act, Dept. of State Bull., Feb. 7, 1942, p. 129. Cf. the following official observations of Secretary Hull, made in his report of the Habana consultative meeting (1940): "The Act of Habana consists of a declaration and a resolution. . . . The general provisions of the declaration and resolution are permanent in character. They authorize action by the American states, individually or collectively, at any time, whether before or after the convention [concerning the provisional administration of European colonies and possessions in the Americas] comes into operation." (Dept. of State Pub. No. 1575 [Conf. Series, 48], pp. 20-21; U. S. Executive Agreement Series, No. 227; and U. S. v. Pink, 62 Sup. Ct. 552 (1942) this JOURNAL, *infra*, p. 309.)

¹⁵ The procedure of consultation might also possibly be properly initiated under the Rio declaration on continental solidarity in the observance of agreements (*acuerdos*) and treaties (No. XXI, Final Act, Dept. of State Bull., Feb. 7, 1942, pp. 132-133).

Relative to Non-Intervention, signed at Buenos Aires, December 23, 1936.¹⁶

This question should, accordingly, be considered. In the Non-Intervention Protocol "the high contracting parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the parties." Would consultation, a consultative order, or joint protective or remedial action employing armed force, acting pursuant to an appropriate order of a consultative meeting, constitute such an intervention? The answer seems clearly in the negative.

It is true enough that no American state, acting alone, could presently intervene legally with armed force to break up such activities; nor could it in the future, until a year had elapsed after it had denounced the Protocol.¹⁷ But even if such joint activities or a consultative meeting were in effect intervention, they would not in any case be an intervention "of any one" of the American governments, which alone the Protocol proscribes. The validity of the consultation, the consultative order, or the forcible action would not depend upon what it might be called by anyone opposing it. The real test of all three aspects would lie in the purpose, practical consequences, and ultimate result of such action—that is to say, whether or not it looked toward, or was, joint preventive or remedial action solely in defense of the hemisphere. Even if the consultative meeting should designate the forces of a particular state to carry out its decision, and such forces alone were used, it would still constitute joint action and not merely action by "any one of them."

The question might be raised whether the very initiation of consultation, in and of itself, by a party to the Protocol, would constitute an "indirect" intervention by the initiating government within the meaning of that term as used in the Protocol? It has been argued that the term "intervention," as there used, applies to diplomatic interposition generally.¹⁸ Even if this were true (which is most doubtful), the Protocol certainly refers to no more

¹⁶ 51 Stat. 41, 44; U. S. Treaty Series, No. 923; 4 Treaties, etc. (Trenwith, 1938), 4821, 4822-4823; this JOURNAL, Supplement, Vol. 31 (1937), p. 57.

¹⁷ Art. 4 of the Protocol stipulates that "The present Additional Protocol shall remain in effect indefinitely but may be denounced by means of one year's notice after the expiration of which period the Protocol shall cease in its effects as regards the party which denounces it but shall remain in effect for the remaining signatory states. Denunciations shall be addressed to the Government of the Argentine Republic which shall notify them to the other contracting states." The denunciation clause was inserted at the request of the Argentine delegate, Dr. Daniel Antokoletz (Proceedings of the Inter-American Conference for the Maintenance of Peace, p. 683). There have been no denunciations to date.

¹⁸ The Spanish word used was "intervención," not "reclamación" or any other similar Spanish word having broader import. The Portuguese equivalent is "intervenção" and the French, "intervention." The draft of the Protocol used the word "intromisión" (*intromisión*). It was changed to "intervention" in order "to express what is meant" and "so as to leave no doubt about it, in the interpretations or translations" (Proceedings, Inter-American Conference for the Maintenance of Peace, p. 82).

than familiar interpositions, that is, to the usual claims that might arise and be pressed as a matter of national policy.¹⁹ The Protocol was signed the same day the American states first established the system of consultation.²⁰ In a very real sense the instrument of consultation was created as the *quid pro quo* for the relinquishment of the traditional right of intervention so far as the American states are concerned.²¹ The fundamental basis of the new institution is that the responsibility for the security, integrity, and independence of the hemisphere is joint and is henceforth to be assured through collective action, rather than by any unilateral application of the earlier concept of the Monroe Doctrine. This type of joint protective action would be a matter of inter-American policy. If external force were used that fact would be immaterial. It seems almost certain that an international tribunal would hold that the initiation of consultation by a particular government, in accordance with inter-American arrangements therefor, was not an indirect intervention within the meaning of the Protocol.²²

There seems to be no legal reason which precludes the American states (if they are so minded) from protecting the hemisphere (by joint action in a particular American country) from adequately-proved and sufficiently-dangerous Axis subversive activity. Entirely within the competence of the inter-American system as it now exists, the American states, acting in concert, can employ such appropriate means as a consultative meeting might decide upon, even resorting to force if necessary, as a last resort.

It is not, however, meant to be suggested that there are no inherent difficulties. Article 20 of the Regulations of the Meetings of Consultation, approved by the Governing Board of the Pan American Union on June 4, 1941, provides that "proposals, reports and projects shall be considered approved when they have obtained the affirmative vote of an absolute majority of the countries represented at the meeting where the vote is taken. Any Minister may make reservations or abstain from voting."²³ Whether this be essentially procedural or substantive, whatever may be the legal effect of any majority-approved "proposals, reports and projects," and notwithstanding the absence of an express counterpart in the inter-American consultative

¹⁹ It is hard to believe that the American governments would have agreed to give up all claims for injuries to their nationals no matter how grave they might be. Recommendation No. XXXV on Pecuniary Claims, adopted at the same conference at which the Protocol was signed, is virtually conclusive proof that there was no such intent. (Report of the Delegation of the United States of America to the Inter-American Conference for the Maintenance of Peace, Dept. of State Pub. No. 1088 [Conf. Series No. 33], p. 232.)

²⁰ See 4 Treaties, etc. (Trenwith, 1938), 4821 and 4817.

²¹ See, e.g., Proceedings of the Inter-American Conference for the Maintenance of Peace, pp. 86, 87, 90.

²² In Art. 2 of the Protocol it is agreed that every question concerning its interpretation, which is not settled by diplomacy, shall be submitted to conciliation or arbitration. There is nothing in the Protocol which purports to stay any such joint action, pending a determination of any interpretative question.

²³ This JOURNAL, Supplement, Vol. 35 (1941), p. 133.

system of Article 5 of the Covenant of the League of Nations,²⁴ past inter-American practice, as a matter of fact, has been in accord with a concept of unanimity, especially on important decisions.

Any unanimity rule creates serious problems. But if an American government had been overthrown by an actual Axis-controlled government, an absolute unanimity might be achieved by a continued recognition of the ousted government. If, by some cunning Axis arrangement, there was no actual overthrow of the government, but the danger to the American states was entirely apparent, the American states could hold, on sound principle, that the consultative system does not imply its own paralyzation in the very situation which it was, and is, primarily designed to safeguard. A consultative meeting could decide that, at least as applied to provisional remedies in such a critical case, the system implied that inter-American unanimity means unanimity without taking into account an Axis-dominated government. This would be applying the universal principle that, in matters vitally affecting the community, a recalcitrant must not be allowed to be a judge with complete power to control a decision in its own case.

But it should not be overlooked that the procedure of consultation is not to be invoked in any but the most serious cases where the danger to the hemisphere is manifest. A consultative meeting will not be convoked as a result of the overthrow of an American government upon the unestablished charge, made by the ousted government, that it was overpowered by a totalitarian group. There is no inter-American counterpart to Article IV, Section 4, of the Constitution of the United States—that “the United States shall guarantee to every state in this Union a republican form of government.” The consultative authority is not in any sense designed to perpetuate “legitimate” governments in the American states. It should be a source of great satisfaction to all the American peoples that the inter-American system is not an American “Holy Alliance,” but an instrument for “coördinating their respective sovereign wills” in order to protect the peace, security, and territorial integrity of the American hemisphere.

²⁴ The first paragraph of Art. 5 stipulates that: “Except where otherwise expressly provided in this Covenant or by the terms of the present treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the members of the League represented at the meeting.”

EXCLUSION AND EXPULSION OF ALIENS IN LATIN AMERICA

BY J. IRIZARRY Y PUENTE

Hardly another question is of greater practical interest in Latin America today, from the point of view of public order and national security, than the inadmission and expulsion of aliens. The question is specially deserving of reëxamination in these days of revolutionary changes in political and legal thought, changes which suggest that legislation designed to safeguard the internal order and external security of a country should not be neglected lest it become powerless to cope with situations which those changes may carry in their wake. The historic events now taking place are in no small measure the symptoms of a profound transition in political and juristic ideas throughout the world.

While it is not the province of those dealing with legal problems as such (and we shall do so here) to assess the merits of political events except as they may have juristic implications, it is our duty to point out the grave consequences to a country of a struggle of ideas for which the local legislation may be unsuited to meet their challenge to the domestic security and institutions or the foreign relations of that country. The moment the shock of events saps the legal vitality or betrays the inadequacy of legislation which aims to protect those institutions and safeguard those relations from defilement, the country is manifestly in danger. Hence, the need for legislative alertness to, and dispassionate study of, the decisive events of contemporary world history, in order to preserve or change, as might be the case, the institutions and relations of the state. This is a duty which each country owes not to itself alone, but also to all others committed along with it to the idea of continental solidarity "through the similarity of their republican institutions."¹

The position of the alien under the liberal legislation of modern times has so far outdistanced his status under Roman Law that he is no longer regarded in another country as without a legal personality. Rather is he accorded full civil equality with its nationals.² This equality is shared liberally by the Latin Americans with the aliens in their midst. No sooner were the political bonds of the mother country severed than they threw off the narrow policy of commercial insulation which the monarchy had fastened upon them.³ Latin America thus embarked upon what has become an un-

¹ Declaration of the Principles of the Solidarity of America, Lima, Dec. 24, 1938.

² *Habeas Corpus de Olivia Soares Silveira*, 52 *O Direito*, 274, 276, Brasil. See 2 Paiva, *Estudio de la Constitución del Paraguay* (Asunción, 1927), Chs. XIII and XVII.

³ 1 Lafont, *Historia de la Constitución Argentina* (Buenos Aires, 1935), 178-187; 1 Levene, *Investigaciones acerca de la Historia Económica del Virreinato del Plata* (La Plata, 1927), Ch. XV, pp. 107, 112 *et seq.*; 1 Bulnes, 1810—*Nacimiento de las Repúblicas Americanas* (Buenos Aires, 1927), 8; Rangel Baez, "El Monopolio del Comercio en la Colonia," 9 *Boletín de la Academia Nacional de la Historia* (Caracas), 29-34; 1 Acevedo, *Manuel de Historia Uruguaya*

interrupted course of toleration toward aliens. There they are not deprived, as Attorney General Montt, of Chile, once pointed out,⁴ of a "single favor except that of the high offices in Congress or the State. Such is the generous legislation which is in force . . . throughout Latin America." This traditional policy is now threatened from within and without to such a degree that it is likely to be radically revised in the not distant future, if it is not already too late.

While the principle of the *jus soli* is fundamental in the nationality legislation of Latin America, it is quite evident that the conspicuous part played in that legislation by the principle of the *jus sanguinis* leaves much room for controversy in regard to the status of countless thousands of persons there.

CLASSIFICATION. Latin American legislation distinguishes between the alien who is a transient (*transeúnte*) and the alien who is domiciled (*domiciliado*).⁵ He is a transient if, although in the country, he does not have a domicile there;⁶ and domiciled if he resides there with the intent, express or presumptive, of remaining.⁷ The distinction is important with respect to the alien's rights and obligations under the local laws.⁸

FREEDOM OF ENTRY. There was a time in the history of the Spanish monarchy's administration of its American domains when the exclusion of aliens was a state policy rigidly enforced. A royal decree of December 8, 1720, referred to certain laws of the *Recopilación de Indias* forbidding aliens "to go to the Indies to trade and carry on commerce" without proper papers, and ordering their expulsion "without exception."⁹ The brilliant Argentinian Juan Bautista Alberdi makes this observation touching that policy:¹⁰

Colonial legislation was exclusive on questions of religion, as it was on questions of commerce, of population, of industry, etc. Exclusivism was of its essence in everything which it touched, and it should be sufficient to remember that it was a colonial legislation of exclusion

(Montevideo, 1916), 32; García Chuecos, *Estudios de Historia Colonial Venezolana* (Caracas, 1937), 310, 311. The *Real Cédulas* of Dec. 8, 1720, and Oct. 23, 1769 (5 *Documentos para la Historia Argentina* [1915], 73, 244) ordered the expulsion of aliens who carried on business in the Spanish dominions.

⁴ *Dictamen emitido al Presidente de la República por el Fiscal de la Corte Suprema Don Ambrosio Montt sobre ciertas reclamaciones* (Santiago, 1890), 106, 111.

⁵ Art. 2, *Ley Núm. 145* (1888), as amended, Art. 21, *Decreto Núm. 1697*, July 16, 1936, and Art. 75, *Código Civil*, Colombia; Art. 3, *Ley de Extranjería*, Cuba; Art. 3, *Ley de Extranjería* (1925), Venezuela.

⁶ Art. 3, *Ley Núm. 145* (1888), as amended, Art. 22, *Decreto Núm. 1697*, July 16, 1936, Colombia.

⁷ Art. 4, *Ley Núm. 145* (1888), as amended, Art. 23, *Decreto Núm. 1697*, July 16, 1936, Colombia. Art. 76, *Código Civil*, Colombia says: "Domicile consists in residence coupled with the real or presumptive intent to remain therein."

⁸ Art. 12, Constitution, Colombia.

⁹ 5 *Documentos para la Historia Argentina*, 73. The decree of Oct. 23, 1769 (5 *ibid.*, 244) declared in force "the Laws which forbid the commerce of aliens in the Indies."

¹⁰ *Organización de la Confederación Argentina* (ed. 1913 by Posada), 91.

and monopoly. The exclusive system was employed with reference to that policy as an instrument of state.

Although this was the traditional system under the influence of which the Latin American colonies were founded, they did not hesitate long to discard it for a more liberal one the moment they broke off relations with the mother country.¹¹ Their laws¹² and treaties¹³ are now eloquent witnesses of the new policy toward aliens, which places them under exceptionally few conditions of entry and stay.¹⁴ It is doubtful if there are many countries with a more tolerant and sympathetic attitude toward outsiders.

RIGHT TO FORBID ENTRY. While it cannot be gainsaid that the alien's right of free entry into the countries of Latin America is liberally recognized in their laws and commitments with foreign Powers, no one will contend that this right is absolute and unabridgable under any view of international law, of domestic policy or of the treaties currently in effect. Were a state required to extend a welcome to all pernicious, subversive or undesirable elements knocking at its door for admission, the state would be in the extraordinary position of having to join in a tacit conspiracy with those elements against its own institutions, its own security and its own public order. The benefit of provisions of the local laws and treaties facilitating the entry of aliens must, therefore, be understood as accruing only to aliens who are not likely to become a threat to the political stability or social order of the country. Every state owes itself that measure of protection at least. It should guard its established order not only from persons acting in their individual capacity, but, having regard to the growth in recent years of the practice of mass infiltration of foreigners under their government's inspiration for political ends, it must guard also against collective action. To this end the state has the right under international law to decide for itself the conditions under which it will permit, forbid, restrict, or regulate the entry and stay of aliens.¹⁵

¹¹ Art. 11, Constitution of Sept. 16, 1810, Mexico (in Rodríguez, *La Condición Jurídica de los Extranjeros en México* [1903], 148, 150): "Every man has the right to enter and leave the country." Art. 7, *Decreto de 29 de Noviembre de 1811* (in 2 Varela, *Historia Constitucional de la República Argentina* [La Plata, 1910], 72): "Every man is free to remain in the territory of the state, or to leave when he pleases."

¹² Art. 1, *Ley Núm. 48* (1920), Colombia; Art. 51, Constitution, Nicaragua; Art. 17, *Ley Núm. 33* (1914), Panama; Art. 18, Constitution, Paraguay; Art. 1, *Ley de Extranjería*, Venezuela; Art. 25, Constitution, Argentine: "The Federal Government shall encourage European immigration."

¹³ Art. 2, Treaty of Amity, Commerce and Navigation, Feb. 2, 1825, Argentine and Great Britain (1 *Colección de Tratados celebrados por la República con las Naciones Extranjeras* [Buenos Aires, 1884], 97, 99): "There shall be . . . reciprocal freedom of commerce." Art. 4, General Convention of Peace, Amity, Commerce and Navigation, May 16, 1832, Chile and United States (1 A. Bascuñan Montes, *Recopilación de Tratados y Convenciones*, 1819-1863 [Santiago, 1894]).

¹⁴ Art. 1, *Convención sobre Condiciones de los Extranjeros*, Sixth International Conference of American States, Havana, 1928; Art. 17, Constitution, Nicaragua.

¹⁵ Lacorda de Almeida, *Expulsão de Estrangeiros* (Rio de Janeiro, 1907), 18; 1 Moreno, *El Código Penal y sus Antecedentes* (Buenos Aires, 1922), Sec. 126, p. 259; Anzoategui, *La Ley*

In the Exposition of Motives of the Alienage Law of Guatemala,¹⁶ we read:

The state, within certain limits, has a perfect right and full freedom to admit foreigners into its territory under the conditions which may seem more suitable to harmonize interests, preserve order and assure faithful compliance with the laws.

In the Maal case, Umpire Plumley, considering the question in its relation to the Venezuelan Government, expressed himself as follows:¹⁷

There is no question in the mind of the umpire that the Government of Venezuela in a proper and lawful manner may exclude, or if need be, expel persons dangerous to the welfare of the country, and may exercise large discretionary powers in this regard. Countries differ in their methods and means by which these matters are accomplished, but the right is inherent in all sovereign powers and is one of the attributes of sovereignty, since it exercises it rightfully only in a proper defense of the country from some danger anticipated or actual.

We are not without the support of judicial decisions of high authority in Latin America on this question. The Supreme Court of Argentina has taken the view that:¹⁸

The state has the right to forbid the entry of foreigners into its territory, or to admit them in the cases and under the conditions it may deem convenient to establish, conformably with the letter and spirit of Articles 25 and 26, Sections 16 and 28 of the Constitution, and within the limitations therein laid down.

The Supreme Court of Brazil said in one case:¹⁹

What is not guaranteed to the alien by the terms of Article 72 of the Constitution, nor by any other constitutional provision, is the right to come to Brazil, to reside there, or to remain there, when for certain reasons which may have to do with the defense of the state, the social tranquillity or the public order, his inadmission in, or expulsion from, our territory may demand it.

Núm. 4, 144 de Residencia (Buenos Aires, 1939), 60; Carbone Oyarrum, *Sistema Constitucional Argentino de Derecho Internacional* (Buenos Aires, 1928), 393; Ulloa, *Derecho Internacional Publico* (Lima, 2d ed. 1938), Sec. 244, p. 257; Aspiazu, *Dogmas del Derecho Internacional* (New York, 1872), Sec. 117, p. 101; 1 Ruiz Moreno, *Lecciones de Derecho Internacional público* (Buenos Aires, 1934), 250; Planas Suarez, *Condición legal de los Extranjeros en Guatemala* (Madrid, 1919), 10. Art. 21, Constitution (1936), Honduras: "Las leyes establecerán la forma y casos en que puede negarse al extranjero la entrada al territorio nacional u ordenarse su expulsión por considerarlo pernicioso."

¹⁶ Decreto Núm. 491, 12 *Recopilación de las Leyes de la República de Guatemala* (1893-1894, ed. Mendez, 1931), p. 417.

¹⁷ Ralston's Venezuelan Arbitrations of 1903 (Washington, 1904), 914-915.

¹⁸ *Habeas Corpus de Irene Amor Magaz de Gonzalez*, 148 Fallos, 410, 414. See also, *Habeas Corpus de Francisco Macia, et al.*, No. 282, 74 *Gaceta del Foro*, 169, Supreme Court of Argentina. For the history of the Macia case, see Palacios y Caminos, *Derecho de Asilo (Caso Macia-Gasso)*, (Buenos Aires, 1928).

¹⁹ *Habeas Corpus de Everardo Dias*, 26 *Revista de Supremo Tribunal*, 19, 20. See also, *Companhia de Seguros Garantia v. União Federal*, No. 696, 88 *O Direito*, 250, 264, Supreme Court, Brazil.

In fact, every Latin American country has laws which authorize the Chief Executive to forbid the ingress of aliens who fall within the prohibited classes.²⁰ From the Executive order there is no right of appeal.²¹

GROUND OF EXCLUSION. The most common grounds of exclusion in Latin America are: that the aliens endanger the public tranquillity,²² or compromise the country's relations with foreign Powers;²³ that they teach or incite changes in or opposition to the social or political order by violent means,²⁴ or spread doctrines which undermine the unity or individuality of the state,²⁵ or which are contrary to the established order;²⁶ that they are anarchists,²⁷ or communists;²⁸ that their presence in the country will result in social or economic disturbances;²⁹ that they have no profession, trade, or means of livelihood,³⁰ or are convicted common criminals, or under indictment;³¹ that they are afflicted with infectious or serious diseases,³² or are insane, idiots,³³ vagrants, gypsies, mendicants, prostitutes, delinquents, adventurers, or carry on some illicit traffic.³⁴ Those excluded for any of these reasons who may later be found in the country, fall under the sanctions of the local law.³⁵

²⁰ Art. 3, *Ley de Expulsiones de Extranjeros*, Núm. 4, 144, Argentina; Art. 1, *Ley de Residencia*, Chile; Art. 17, Constitution, Honduras; Art. 50, *Ley de Extranjería*, Honduras; Art. 17, Constitution, Nicaragua; Art. 14, *Ley de Extranjería*, Venezuela.

²¹ Art. 4, *Lei Núm. 1,641* (1902), Brazil; Art. 53, *Ley de Extranjeros*, Honduras; Art. 27, *Ley de Extranjeros*, Venezuela.

²² Art. 1, *Lei 1,641* (1907), Brazil; Art. 1 (4), *Ley de Expulsiones*, Costa Rica; Art. 14 (1), *Ley de Extranjeros* (1925), Venezuela.

²³ Art. 14 (1), *Ley de Extranjeros*, Venezuela.

²⁴ Art. 2, *Ley de Residencia* (1919), Chile; Art. 7 (d), *Ley Núm. 48* (1920), Colombia; Art. 14 (6), *Ley de Extranjeros* (1925), Venezuela.

²⁵ Art. 2, *Ley de Residencia* (1919), Chile.

²⁶ *Idem*.

²⁷ Art. 7 (d), *Ley Núm. 48* (1920), Colombia; Art. 17, *Ley Núm. 32* (1914), Panama; Art. 14 (b), *Ley de Extranjeros* (1925), Venezuela.

²⁸ Art. 7 (d), *Ley Núm. 48* (1920), Colombia: "who attempts against the right of property."

²⁹ *Compahnia de Seguros Garantía v. União Federal*, No. 696, 88 *O Direito*, 250, 254, Brazil.

³⁰ Art. 1, *Ley de Residencia* (1919), Chile; Art. 15, *Ley de Extranjería*, Costa Rica; Art. 14 (1), *Ley de Extranjeros* (1925), Venezuela.

³¹ Art. 2 (1) (2), *Lei Núm. 1, 641* (1907), Brazil; Art. 1, *Ley de Residencia* (1919), Chile; Art. 7 (e), *Ley Núm. 48* (1920), Colombia; Art. 1 (2), *Ley de Expulsiones*, Costa Rica; Art. 14 (3), *Ley de Extranjeros* (1925), Venezuela.

³² Art. 1, *Ley de Residencia* (1919), Chile; Art. 7 (a), *Ley Núm. 48* (1920), Colombia; Art. 17, *Ley Núm. 32* (1914), Panama; Art. 14 (7), *Ley de Extranjeros* (1925), Venezuela.

³³ Art. 7 (b), *Ley Núm. 48* (1920), Colombia; Art. 17, *Ley Núm. 32* (1914), Panama; Art. 1, *Ley de Extranjería*, Peru.

³⁴ Art. 2 (3), *Lei Núm. 1, 641* (1907), Brazil; Art. 2, *Ley de Residencia* (1919), Chile; Art. 71 (c), *Ley Núm. 48* (1920), Colombia; Art. 1, *Ley de Expulsiones*, Costa Rica; Art. 17, *Ley Núm. 32* (1914), Panama.

³⁵ Art. 53, *Ley de Extranjeros* (1925), Venezuela: "imprisonment from six months to one year."

RIGHT OF EXPULSION. The admission of an alien into the country should not be construed as an absolute guarantee of a right to remain there. It is a conditional stay, that is to say, conditional on his abstaining from acts which may prove harmful to the community in which he lives. If neither local legislation nor treaties guarantee irrevocably such stay, the alien's privilege is subject to revocation for cause.^{35a} It cannot be claimed either that constitutional guarantees of inviolability of the rights to liberty, security and property,³⁶ and to remain (*permanecer*) in the country,³⁷ assure him, irrevocably, the right to stay. It is a privilege which, in order to be enjoyed without interruption, must be exercised "in strict subjection to the laws."³⁸ The state retains at all times, regardless of the conditions of admission, the unqualified right to safeguard its own security and public order by expelling an alien whose acts may be viewed by the local sovereign as dangerous to the country.³⁹ The Supreme Court of Brazil in one case⁴⁰ quoted these words of Lacerda de Almeida:⁴¹

The state is an organism. Real or analogous to that of other organisms, the organic life of the state presents the same phenomena as that of living organisms. The latter repel the penetration of injurious substances, and expel those which they cannot assimilate. The state which defends the public health against the invasion of pestilences by establishing sanitary restrictions and punishing with death at times those violating them, can, with equal right, watch its immigration and shut its doors and frontiers to aliens pernicious to the public order, as the anarchist,

^{35a} *Habeas Corpus de Everardo Dias*, 26 *Revista de Direito*, 19, 27, Supreme Court, Brazil: "Esta materia de expulsão de estrangeiro é regulada, principalmente, pelo direito publico interno. No direito internacional apenas se nos deparam algumas restricções á actividade legislativa e administrativa dos Estados. É esse o conceito juridico, geralmente admittido na theoria e na pratica. Tratando da admissão e da expulsão dos estrangeiros, doutrina Despagnet: 'La condition légale des étrangers est, en principe, fixée d'une manière souveraine par le droit interne de chaque pays; mais le respect qui est dû aux autres Etats impose au legislateur certaines restrictions que fixe le Droit International' (*Cours de Droit International Public*, n. 334, 4^a ed.)."

³⁶ Art. 113, Constitution, Brazil.

³⁷ Art. 51, Constitution, Nicaragua; Art. 18, Constitution, Paraguay.

³⁸ Art. 51, Constitution, Nicaragua.

³⁹ Lacerda de Almeida, *op. cit.*, 18; Rodrigo Octavio, *Le Droit international privé dans la législation Brésilienne* (Paris, 1915), 103-104; 1 Moreno, *El Código Penal, op. cit.*, p. 261; 1 Bielsa, *Derecho Administrativo y Ciencia de la Administración* (Buenos Aires, 2d ed. 1929), 64; Villegas-Pulido, *Los Extranjeros en Venezuela* (Caracas, 2d ed. 1919), 56; 2 Roure, *A Constituinte Republicana* (Rio de Janeiro, 1920), 305; Flores y Flores, *Extracto de Derecho Internacional* (Guatemala, 1902), 204; Castro y Casaleiz, *El Derecho de Expulsión ante el Derecho Internacional y la Legislación Española* (Madrid, 1895), 11, 13; Art. 17, Constitution, Honduras; Art. 17, Constitution, Nicaragua.

⁴⁰ *Habeas Corpus de Rosa Press*, 65 *Revista de Direito*, 89, 93. In *Habeas Corpus de Everardo Dias*, 26 *Revista de Supremo Tribunal*, 19, the Supreme Court of Brazil said: "O Estado tem a faculdade, attributo da soberania, de expulsar do seu territorio, os estrangeiros nocivos à segurança social ou a ordem publica."

⁴¹ *Expulsão de Estrangeiros* (Rio de Janeiro, 1907), 9-10.

to morality, as the prostitute (*caften*), to individual security, as the convict or common criminal.

In the same way it can, under given circumstances, *deport* (that was the expression in our traditional law) or expel the alien dangerous to peace or public order (the conspirator, the spy, the traitor), or to public morality (the prostitute), or to individual security (the criminal or suspected of crime).

In both cases the state shields or defends itself, throws off bad elements, exercises the moral prophylaxy which it needs as much as the medical prophylaxy, to live.

These are the terms in which the question is actually discussed in the realm of principle, and not in that of the false juridical anachronism of the revival of the distrust and odious suspicion in which the alien was once held. . . .

"Therefore," added the court, "the liberty which the national Constitution assures to all those who wish to dwell in the territory of Brazil cannot be carried to the extent of compromising the security of its political existence, of its property, and of its morals; and does not involve the renunciation of a right which existed prior to the law itself and which is founded upon the principle of national salvation."

In 1907 the Brazilian Government enacted Law No. 1,641 on the Expulsion of Aliens. Within a month there was a test of it in the case of the *Habeas Corpus de Alfredo Rossi*,⁴² in the Federal District Court in Rio de Janeiro. Judge da Cunha observed that the rights which the Constitution gave to aliens residing in the country undergo, like the rights of nationals, certain limitations in the interest of public order and the general good; and then he added:⁴³

Considering, that the right to expel an alien, by reason of public and political order, has been exercised, and still is, by all governments; and is expressly found in French, Swiss, Danish, Spanish, Dutch and English legislation (Lafayette, *Principios de Direito Internacional*, § 144);

Considering, that nobody denies to the Executive Power of a state, as a corollary of its independence and sovereignty, the right to expel an alien when there are causes to justify it, as when he conspires against its institutions, disturbs the public tranquillity, disobeys the public authorities, or engages in immoral practices.

The Supreme Court of Brazil took a similar view in the matter of the *Habeas Corpus de Vicente Vacirca*,⁴⁴ when it said:

⁴² 3 *Revista de Direito*, 530-541. In the *Habeas Corpus de Vicente Urbino de Freitas*, 3 *Revista de Direito*, 541, a federal District Court in Rio said: "E, considerando que o direito de expulsão de estrangeiros está universalmente reconhecido como um consectario da soberania e é praticado pela maioria das Nações cultas em nome dos interesses da segurança da ordem e da moralidade." ⁴³ p. 539.

⁴⁴ 12 *Revista de Direito*, 311, 314. In the *Habeas Corpus de Everardo Dias*, 26 *Revista de Supremo Tribunal*, 19, the same court said: "It is an admitted principle of international law that the State has the authority, as an attribute of sovereignty, to expel from its territory, or not to permit the entry therein, of aliens harmful to the social security or to public order."

No state has ever been regarded as having renounced the right to expel or deport an alien, for *serious causes*, among which, it has always been acknowledged, is the public safety and tranquillity. Acts of that sort are found everywhere, either by virtue of express laws, or as mere measures of *high police*. (P. Fiori, *Droit Penal International*, n. 95 *et seq.*; Franz Despagnet, *Droit Int. Public*, p. 383 *et seq.*; Otto Mayer, *Droit Adm. Allemand*, tit. 4, p. 357; etc.), and, notably, in the United States of North America, where the Supreme Court has never declared unconstitutional in any case, the laws of that country authorizing the government not only to prohibit the entry of undesirable aliens, but also to expel the alien notwithstanding that he is a *resident*. (Sup. Court: *Edye v. Robertson*; *Nishimura Eku v. U. S.*; *Char Chan Ping v. U. S.*; *Fong Yue Tsing Williams, Lu Joe v. U. S.*; *Tourn v. Williams*—the latter case having been decided in 1904; Wharton, *Inter. Law Dig.*, §§ 198 and 206; Taylor, *Int. Pub. Law*, 186; Moore, *A Dig. of Int. Law*, § 550 *et seq.*)

This right, as it concerns Latin America, has received recognition at the hands of an international tribunal in the Paquet case,⁴⁵ where Umpire Filtz had this to say:

That the right to expel foreigners from or prohibit their entry into the national territory is generally recognized; that each state reserves to itself the exercise of this right with respect to the person of a foreigner if it considers him dangerous to public order, or for considerations of a high political character, but that its application cannot be invoked except to that end.

THE "DOMICILED ALIEN." While there is general agreement in Latin America that the *transient* alien is subject to expulsion for cause, opinion is not quite agreed on whether the *resident* or *domiciled* alien is also subject to expulsion.⁴⁶ Said the Supreme Court of Brazil in the *Recurso de Habeas Corpus de Giacomo Cortazzi*:⁴⁷

The latter, the non-resident aliens, who cannot invoke the same constitutional guarantees as resident aliens, have their rights guaranteed by international law (Despagnet, *Cours de Droit International Public*, n. 344, ed. of 1910, and A. Rolin, *Principes de Droit International Privé*, vol. 1, introduction n. ix, ed. of 1897), which does not exclude the enjoyment of countless rights reserved for Brazilians and "resident" aliens, and consequently, there is no legal objection to the expulsion of non-resident aliens, since expulsion is a measure approved by the legislation of the most advanced nations (A. Martino, *L'Expulsion des Étrangers*, and *Étude de Droit Comparé*, pp. 12 to 16, and 42 to 53).

On the whole, it can be said that, although the period of residence in the country, however extended, is no obstacle to expulsion if there is no law forbidding it on that ground,^{47a} the constitutional and legislative liberalism of Latin America, induced by the economic necessity of finding a population

⁴⁵ Ralston's Venezuelan Arbitrations of 1903, 265, 267.

⁴⁶ For the difference between the *transient* and *domiciled* aliens, see *supra*, notes 5-8, p. 253.

⁴⁷ No. 3,598, 3 *Revista do Supremo Tribunal*, Pt. I, pp. 13, 16.

^{47a} *Habeas Corpus de Everardo Dias*, *supra*.

for that vast territory,⁴⁸ has leaned toward the policy of guaranteeing the domiciled or resident alien the right to remain in the country, and therefore, to be exempt, unlike the *transient* alien, from forceful removal from it.⁴⁹

The weight of judicial opinion in Latin America is also in favor of construing applicable provisions of the local laws so as to exclude the resident or domiciled alien from the operation of the expulsion laws. The Supreme Court of Argentina in one important case said:⁵⁰

Article 14 of the Constitution confers upon all inhabitants of the country, conformably with the laws which regulate its exercise, among others, the right to enter, remain in, travel in, and leave Argentine territory. The term "inhabitant," which comprises nationals as well as aliens, refers to the persons who reside in the territory of the Republic with the intention of remaining therein, who inhabit it, although they have not exactly established a domicile with all its legal effects. Messrs. Macia and Gassol, since their entry into the country, became inhabitants of it and enjoyed, therefore, all the rights and guarantees proclaimed for their benefit in Articles 14 and 20 of the Constitution.

In one case in Brazil⁵¹ where there was proof that petitioner had lived in the country for many years, it was ruled that, "as a matter of law, upon proof of the *residence* of the alien in accordance with the concept of *residence* in civil law, there is no room for expulsion. In all that is said respecting the guarantees of liberty and of individual security given by the Constitution, *resident aliens in Brazil* are on a footing of equality with *natives and naturalized Brazilians* (Pedro Lessa, *Do Poder Judiciario*, § 65)."

Another Brazilian case discusses the question in considerable detail. The provision involved was Article 72 of the Constitution of 1891,^{51a} which read:

The Constitution assures to Brazilians and to foreigners resident in the country the inviolability of their rights relating to liberty, individual safety and property, in the following terms:

* * *

Par. 33. The Executive Power is allowed to expel from the national territory foreign subjects dangerous to public order or harmful to the interests of the Republic.

The specific point at issue was whether the term "foreign subjects," of paragraph 33 referred only to transient aliens or included also "foreigners resident in the country" to whom the guarantees of liberty, safety and prop-

⁴⁸ Alberdi, *Bases y puntos de partida para la organización política de la República Argentina* (Buenos Aires, 1852), 234.

⁴⁹ Art. 3, *Decreto No. 1, 641*, of Jan. 7, 1907, Brazil, forbids expulsion of "aliens who reside in the territory of the Republic." Art. 1, *Ley sobre Expulsion de Extranjeros* (1908), Peru, applies to aliens who have not acquired a "domicile" in the country.

⁵⁰ *Habeas Corpus de Francisco Macia, et al.*, *supra*.

⁵¹ *Habeas Corpus de Adelina Gianelli*, 39 *Revista de Direito*, 254.

^{51a} Same provision in Constitution of 1934 (Art. 113), and Constitution of 1937 (Art. 122).

erty were accorded. Judge Lessa, speaking for the Supreme Court, said:⁵²

What are the rights of non-resident aliens in Brazil? We must go to international law, civil and penal, for the principles and rules which determine and enumerate the rights of non-resident aliens. The latter, in the face of the Constitution, which did not cover them, which guaranteed them nothing, *can only invoke international law, penal or civil.* Nothing else.

* * *

What, then, distinguishes in this respect aliens who are non-resident from those who are resident in Brazil? *Only this: the former can be expelled or deported, but the latter can not.*

* * *

The only thing which distinguishes the resident from the non-resident is the legal possibility of the latter to be deported. International law, which assures non-resident aliens the same standard of judicial law applicable to Brazilians, permits, however, their expulsion. This is what we read in the treatises on private international law, as, for instance, in Despagnet (*Précis de Droit International Privé*, n. 37, ed. of 1909).

What Article 72 of the Federal Constitution means, therefore, interpreted in the light of the principles and rules of international law, penal and civil, is that resident aliens in Brazil cannot be deported.

* * *

To decide otherwise would be to suppress the guarantees, all the guarantees which the Federal Constitution grants to *resident aliens*. If the expulsion of residents were authorized, these would be placed exactly and totally in the position of non-residents, and the first paragraph of Article 72 would thus be eliminated from the constitutional text.

The Supreme Court of Panama said in one case⁵³ that since petitioners "are domiciled in the country, the court . . . declares that the said Chinese have the right to remain in the country in accordance with law."

Finally, Umpire Filtz, in the Paquet case,⁵⁴ ruled that "according to the constitution of Venezuela, [the attributes of the executive power] do not extend to the power to prohibit the entry into national territory, or expelling therefrom, of domiciled foreigners whom the Government suspects of being prejudicial to the public order."

On the other side of the question is the Havana Convention on the Status of Aliens (1929), which includes the domiciled alien among those liable to expulsion. The text reads:⁵⁵ "The state can, by reason of public order or security, expel the alien who is domiciled, residing, or merely passing through its territory." The inadequacy of the convention to cope with the position of the resident or domiciled alien in Latin America is manifest. It

⁵² In 2 Roure, *op. cit.*, 308, 310, 311, 312, 313. See also *Habeas Corpus de Vicente Vacirca*, *supra*; *Habeas Corpus de Giacomo Cortazzi*, *supra*; and opinion of Judge Lessa in *Habeas Corpus No. 21*, 414, 86 *Revista de Direito*, 244, on the meaning and scope of Art. 72 (33).

⁵³ *Habeas Corpus de Len Sen, et al.*, 9 *Registro Judicial*, 289.

⁵⁴ Ralston's Venezuelan Arbitrations of 1903, 265, 267.

⁵⁵ Art. VI, Sixth International Conference of American States.

cannot modify constitutional provisions protecting him from expulsion; neither can it affect nationals of non-signatory states.

To sum up, then, the resident or domiciled alien is, by the weight of authority, exempt from deportation under constitutional provisions which guarantee to him the right to liberty and to remain in the country.

In order to clothe the state with authority to expel an alien in defense of its interests, there is no need of an express law. It is "a right which existed prior to the law itself and which is founded upon the principle of national salvation."⁵⁶ "It is a right," as one case puts it,⁵⁷ "of conservation and defense, inherent in the organization of the state; it does not depend on a law which recognizes it, and to make it effective as an administrative measure of high police, it is enough that the law does not prohibit its exercise. States have put to use that sovereign right whenever the public tranquillity has demanded it, whether there are or not governments which regulate the form in which it should be exercised."

True, Umpire Ralston, in the Boffolo case,⁵⁸ took the position that if there was no law to govern the matter of expulsion, the "power to expel was wanting. Any other conclusion would make Venezuela's Government despotic—not republican or democratic." We cannot agree with this view. If, as Umpire Plumley said in the *Maal Case*, the right to exclude or expel foreigners dangerous to the welfare of the country is "inherent in all sovereign powers and is one of the attributes of sovereignty"; if, as the Supreme Court of Brazil said in the *Everardo Dias* case, the right is "inherent in the organization of the state," then, to argue, as Umpire Ralston has done, that without a law the power of expulsion is wanting, is tantamount to taking from the state a power inherent in it, to deprive it of an attribute of sovereignty. It is hardly conceivable that an attribute of sovereignty can be denied to the state simply because it has not found expression in some written law. No principle could be more ruinous to the stability of the state than that the silence of the law is equivalent to the denial of an essential element of sovereignty. No constitution or law, however comprehensive in its terms, can possibly express the full measure of a state's sovereign powers.

If we concede the right of the alien to enter and remain in the country for legitimate ends, if we consider the international misunderstandings which may and frequently do arise from the unfair and arbitrary treatment of foreign nationals in this respect by the local authorities, it is quite obvious that great care should be observed in the exercise of the delicate right of expulsion. As one case in which this question was debated, said:⁵⁹

The expulsion of foreign subjects entails an obvious importance in all cases in which it becomes necessary to order it, for although in the

⁵⁶ *Habeas Corpus de Rosa Prêss, supra.*

⁵⁷ *Habeas Corpus de Everardo Dias, supra.*

⁵⁸ Ralston's Venezuelan Arbitrations of 1903, 696, 704.

⁵⁹ *Habeas Corpus de Alberto Berthelot*, 11 *Registro Judicial*, 485, 486, Supreme Court, Panama.

case of pernicious individuals that course can be fully justified, it is essential to proceed with much care in order to avoid diplomatic claims in the event an error is committed in deporting an honest and industrious man in the belief that his conduct is bad or that he is a criminal. This is why in civilized countries the decrees of deportation are issued by the Executive Power through the Ministry for Foreign Affairs, when it is shown that the alien comes within any of the cases which warrant expulsion in conformity with the laws in force.

Latin America does not leave this matter entirely to uncontrolled executive discretion. In practically all of them there are laws which, although differing in important respects, aim to strike a just balance between the rights of the state and of the alien, by defining the scope of executive authority and outlining a definite form of procedure which tends to lessen the opportunity for administrative arbitrariness. These laws are constitutional, notwithstanding the guarantees of inviolability of liberty, security and property which the constitutions accord.⁶⁰

GROUND OF EXPULSION. International law authorizes the expulsion of an alien on the broad and not easily definable ground of "public order or security,"⁶¹ or, as the Supreme Court of Brazil has more accurately worded it, only "'for grave reasons of public order or internal security.' Fiori, *Du Droit International codifié*, trans. Christ, n. 412.),"⁶² unless, of course, the matter is regulated by treaty.⁶³ Latin America has generally conformed to this legal criterion,⁶⁴ as a study of it in the light of local legislation will show.

First, let us consider—

I. Public order. The term may be vaguely defined as respect for the laws and authorities of the country.⁶⁵ It has been defined with greater particularity by a Brazilian court—quoting Alglave, *Action du Ministère Public*, Vol. I, p. 572—as follows:⁶⁶

L'ordre public, c'est évidemment l'ordre de la société considérée au point de vue moral comme au point de vue matériel, dans le domaine

⁶⁰ *Habeas Corpus de Vicente Vacirca*, *supra*.

⁶¹ Art. VI, *Convención sobre Condición de los Extranjeros*, Sixth International Conference of American States, Havana, 1929.

⁶² *Habeas Corpus de Vicente Vacirca*, *supra*. In the *Habeas Corpus de Rosa Press*, *supra*, the same court said: "From this, however, it should not be concluded, as it has been done insistently but without foundation, that the power of expulsion is restricted: (a) to those judicially condemned, because the truth is that the constitutional provision authorizes it in the broadest terms, even when there is no conviction, if it is shown that the alien is dangerous to the public order, or pernicious to the interests of the Republic."

⁶³ Art. 32, *Ley de Extranjería*, Venezuela.

⁶⁴ Art. 2, *Ley sobre expulsión de extranjeros*, Núm. 4,144 (1902), Argentina; Bacque, *Estaduto Legal del Extranjero* (Buenos Aires, 1938), 71-73; Anzoategui, *op. cit.*, 62 *et seq.*; Art. 72 (33), *Constitución*, and Art. 1, *Lei Núm. 1,641* (1907), Brazil; Art. 13, *Ley Núm. 48* (1920), Colombia; Art. 1 (4), *Ley de Expulsiones*, Costa Rica; Art. 9, *Ley de Extranjeros*, Ecuador; Art. 50, *Ley de Extranjería*, Honduras; Art. 1, *Ley de Expulsión de Extranjeros*, Peru.

⁶⁵ *Habeas Corpus de Rosa Press*, *supra*, 89, 93.

⁶⁶ *Recurso de Nicolão Tairowich*, 42 *Revista de Direito*, 198, 204 (Orphans' Court, Rio de Janeiro).

des idées comme dans celui des faits, d'ordre public, c'est donc l'organisation de la société, et par suite les lois qui l'intéressent sont celles qui régissent plus ou moins directement cette organisation.

Among the acts and practices which Latin American legislation regards as compromising the moral and material order of society—the "public order," in other words—are these: conviction of, or pending prosecution for, a common crime or offense, either in a foreign country,⁶⁷ or in the local state,⁶⁸ under some general penal code or special statute;⁶⁹ immoral practices or vicious habits indicating incorrigible moral depravity,⁷⁰ such as pimping,⁷¹ prostitution,⁷² illicit traffic,⁷³ maintenance of brothels,⁷⁴ selling of cocaine,⁷⁵ and the like. Any of these practices would brand the alien as a person of "bad character, whose expulsion would be beneficial to the community, as such person could only serve to increase crime, and to cloak other criminals with impunity";⁷⁶ affliction with serious or infectious diseases;⁷⁷ vagrancy and beggary;⁷⁸ harmfulness to religion;⁷⁹ and fraud in entering the country.⁸⁰

Let us next consider—

II. National Security. Unfortunately, there is no available legislative or judicial definition of this phrase in Latin America; but it is permissible to say that it must be defined in the light of the institutional and political life of the country. It refers to causes which endanger: (1) the internal or external security of the state by weakening or overturning its institutions of government, or, (2) the relations of the state with foreign Powers.

⁶⁷ Art. 1, *Ley Núm. 4,144* (1902), Argentina; Art. 2 (1), *Lei Núm. 1,641* (1907), Brazil; Arts. 1 and 3, *Ley de Residencia*, Chile; Art. 15, *Ley de Extranjería y Naturalización*, Costa Rica; Art. 52, *Ley de Extranjería* (1906), Honduras; Art. 17, *Ley Núm. 32* (1914), Panama.

⁶⁸ Art. 2 (2), *Lei Núm. 1,641* (1907), Brazil; Arts. 1 and 3, *Ley de Residencia*, Chile; Art. 8 (d), *Ley Núm. 48* (1920), Colombia; Art. 1, *Decreto Núm. 13*, *Ley de Expulsiones*, Costa Rica; Art. 16, *Ley de Extranjería*, Costa Rica; Art. 27, *Ley Núm. 32* (1914), Panama; Art. 21, *Ley de Extranjeros* (1925), Venezuela.

⁶⁹ *Habeas Corpus de Vicente Vacirca*, *supra*, 311, 315.

⁷⁰ Art. 8 (d), *Ley Núm. 48* (1921), Colombia; Art. 9, *Ley de Extranjeros*, Ecuador.

⁷¹ Art. 2 (3), *Lei Núm. 1,641* (1907), Brazil; *Recurso de Habeas Corpus de A. Berthelot*, *supra*.

⁷² *Habeas Corpus de Rosa Press*, *supra*.

⁷³ Arts. 2 and 3, *Ley de Residencia*, Chile.

⁷⁴ *Habeas Corpus de Rosa Press*, *supra*.

⁷⁵ *Id.*

⁷⁶ *Habeas Corpus de A. Berthelot*, *supra*.

⁷⁷ Arts. 1 and 3, *Ley de Residencia*, Chile.

⁷⁸ Art. 2 (3), *Lei Núm. 1,641* (1907), Brazil; Art. 15, *Ley de Extranjería*, Costa Rica; Art. 1 (1), *Ley de Expulsiones*, Costa Rica; Arts. 1 and 3, *Ley de Residencia*, Chile.

⁷⁹ Art. 9, *Ley de Extranjeros*, Ecuador.

⁸⁰ Art. 8 (a), *Ley Núm. 48* (1920), Colombia; Art. 52, par. 2, *Ley de Extranjería*, Honduras; Art. 6, *Ley de Extranjería* (Núm. 4,145, Sept. 22, 1920), Peru. In the interesting case of *Habeas Corpus de Francisco Macia, et al.*, *supra*, the Supreme Court of Argentina said: "That entry into the country in violation of the decree of the Executive Power does not carry with it expulsion as a consequence, since such penalty is not specially provided for in any law in force."

These two categories of causes will be studied separately.

(A) *Causes endangering security.* The most important causes which endanger the security of the state are:

(i) *Participation in domestic politics.*⁸¹ The fullest statement in the legislation of Latin America of this prohibition against participating in the politics of the country is in the Alienage Law of Venezuela;⁸² and we quote it in detail because of the lengths to which it goes (much farther than any other, to be sure) in defining the degree of control which the local state in Latin America has attempted to exert over aliens in matters of national security. The text follows:

Aliens must maintain strict neutrality in the public affairs of Venezuela, and will, therefore, abstain:

- 1st. From forming part of political societies.
- 2nd. From editing political newspapers and from writing about the politics of the country.
- 3rd. From interfering directly or indirectly in the domestic dissensions of the Republic; and,
- 4th. From making speeches relating to the politics of the country.

The prohibition is against meddling in the public affairs of the *local* state. That, in the nature of things, is the only restriction upon the political activity of the foreigner which the country of asylum can lawfully impose. The foreigner, in other words, cannot participate in local political activities which are permissible only to the citizen of the country;⁸³ but the local government cannot strip him of the right to engage in activities which touch only the public affairs of his own country. In fact, there is a guarantee of the enjoyment of this right in constitutional provisions (general throughout Latin America) which assure the alien that he can *meet peaceably and associate for all lawful purposes*.⁸⁴ However, a more serious question arises when aliens try to exercise, collectively, within the territory of the local state, and with respect to local matters, political rights vested in them by the laws of their country. The exercise of political rights by aliens, in so far as those rights may affect the security, laws and institutions of the state of asylum, do not have to be tolerated under any view of international law. If this were not

⁸¹ Art. 42, *Ley de Extranjería* (1906), Honduras; Art. 22, par. 2, Constitution, Mexico; Art. 26, *Ley Núm. 32* (1914), Panama. Some legislations call it "public affairs" (Art. 8, *Ley Núm. 145* (1888), as amended, Art. 8 (f), *Ley Núm. 48* (1920), Colombia; Art. 8, *Ley de Extranjeros* (1925), Venezuela; others call it "political activities" (Art. 7, *Convención sobre Condición de los Extranjeros*, Havana (1929); still others "civil dissensions" (Art. 9, *Ley de Extranjeros*, Ecuador; Art. 46, *Ley de Extranjería* (1906), Honduras; Art. 38, *Ley sobre Extranjería*, Mexico).

⁸² Art. 8, *Ley de Extranjeros* (1925), Venezuela.

⁸³ Art. 7, *Convención sobre Condiciones de los Extranjeros*, Havana (1929).

⁸⁴ E.g., Art. 22, Constitution, Costa Rica; Art. 20, Constitution, Panama; Art. 18, Constitution, Paraguay; Vedia, *Constitución Argentina* (Buenos Aires, 1907), 77 (g); 1 Gonzalez (Joaquin V.), *Derecho Constitucional Argentino* (Buenos Aires, 1930), § 339, p. 409; 1 Montes de Oca, *Lecciones de Derecho Constitucional* (Buenos Aires, ed. Calandrelli, 1917), 412 *et seq.*

so, the tranquillity and the very existence of the state would depend on the sufferance of aliens, and peoples would be compelled once more to go back to the ideas of the Roman Law as a means of self-preservation. But, in point of fact, Latin American governments have, as occasion arose, refused to recognize the delegation by foreign governments to their official representatives of authority or powers which were deemed incompatible with national sovereignty.⁸⁵ By the same token, the local state is not bound under any rule of law to recognize in unofficial aliens rights which, if exercised locally, would be incompatible with its security and institutions of government. The political rights which aliens may have under the law of the country of origin are neither transitory nor transmissible, and cannot be exercised within another jurisdiction either by themselves or by their children if this is contrary to local law or policy.⁸⁶ An alien who takes part in the public affairs of the local state is subject to the sanctions of its law,⁸⁷ including expulsion.⁸⁸

(ii) *Violent changes in state structure.*⁸⁹ It is the right and prerogative of a sovereign people to establish and maintain in the territory they occupy, for as long as they may deem it convenient, institutions of government and laws suitable to themselves. The alien, after he has been granted the hospitality of the country, cannot advocate or attempt the displacement or overthrow of its political, social or legal structure by violent means, or promote public gatherings which are contrary to the established order of things. The cardinal, though tacit, condition of his admission to the country is respect for the institutions and laws he may find there.

(iii) *Subversive doctrines.*⁹⁰ To teach or advocate doctrines which are incompatible with the political unity or individuality of the state is not the privilege of the alien.

(B) *Causes endangering relations.* Among the causes which endanger the foreign relations of the state are:

(i) *Violation of neutrality.* It is not permissible to the alien to compro-

⁸⁵ 13 *Revista Chilena*, 231: "Aún puede menos el Gobierno de Chile reconocer en los agentes diplomáticos o consulares de las potencias extranjeras una delegación o representación del Ministerio Público de su patria para proceder criminalmente contra los trasgresores de las leyes de ella."

⁸⁶ No. XXVIII, Appendix A, Report on the Results of the Conference, VIIIth International Conference of American States, Havana (1929). Resolution on the "Political Activities of Foreigners."

⁸⁷ Art. 43, *Ley de Extranjería* (1906), Honduras; Art. 7, *Convención sobre Condiciones de los Extranjeros*, Havana (1929).

⁸⁸ Art. 15, *Ley de Extranjería*, Costa Rica; Art. 9, *Ley de Extranjeros*, Ecuador; Art. 38, *Ley sobre Extranjería*, Mexico; Art. 13, *Ley Núm. 145* (1888), as amended Art. 8 (f), *Ley Núm. 48* (1920), Colombia; Art. 46, *Ley de Extranjería* (1906), Honduras.

⁸⁹ Arts. 2 and 3, *Ley de Residencia*, Chile; Art. 8 (b), *Ley Núm. 48* (1920), Colombia: "such as anarchism, or communism, which assail the right of property"; Art. 51, *Ley de Extranjería* (1906), Honduras.

⁹⁰ Arts. 2 and 3, *Ley de Residencia* (1919), Chile.

mise the international relations of the state by violating its neutrality⁹¹ or its treaty obligations.⁹²

(ii) *Opposition to peace.* It is not an alien's right to oppose the efforts of the government of the country to establish peace in case of international war or rebellion,⁹³ or to disturb the public tranquillity or peace of a friendly Power.⁹⁴

(iii) *Violation of conditions of asylum.*⁹⁵ Giving asylum to political refugees from another country is always a delicate question which may disturb relations between states unless proper safeguards are taken by the authorities of the country of asylum to prevent the refugees from using its territory to foment trouble in the state from which they fled. Violation of the conditions of asylum will justify the expulsion of the refugees.

EXPULSION AS AN EXECUTIVE ACT. In Latin America, the Chief Executive alone has the authority to order an expulsion;⁹⁶ and this, it is said, can be done administratively,⁹⁷ and summarily.⁹⁸

JUDICIAL REVIEW. Opinion is sharply divided there as to the character of an act of expulsion. Is it *administrative*, and as such, exclusively in the province of the Executive? or, does it require, in addition, the concurrence of the judiciary before it can be carried out? There are two systems on this question: the *administrative*, which regards it as a matter solely for executive determination; and, the *mixed*, which subjects executive action to judicial review.

Let us take up first the—

I. *Administrative system.* This system lodges all authority exclusively in the hands of the Executive,⁹⁹ and says, in effect, that no recourse can be admitted against his act of expulsion,¹⁰⁰ except to the Executive himself.¹⁰¹

⁹¹ Art. 25, *Ley Núm. 32* (1914), Panama.

⁹² Art. 26, *ibid.*

⁹³ Art. 17, *Ley de Extranjería*, Venezuela.

⁹⁴ Art. 51, *Ley de Extranjería*, Honduras.

⁹⁵ Art. 20, *Ley de Extranjería*, Venezuela.

⁹⁶ Art. 2, *Ley sobre Expulsión de Extranjeros*, Argentina; Art. 72 (33), Constitution, Brazil; Art. 7, *Lei Núm. 1,641* (1907), Brazil; Art. 53, *Ley de Extranjería* (1906), Honduras; Art. 27, *Ley Núm. 32* (1914), Panama; Art. 100 (22), Constitution, Venezuela; Arts. 17 and 22, *Ley de Extranjeros*, Venezuela. In *Habeas Corpus de A. Berthelot*, *supra*, the Supreme Court of Panama held that "the decrees of deportation are issued by the Executive Power."

⁹⁷ Art. 15, *Ley de Extranjería*, Costa Rica.

⁹⁸ *Ibid.*; Art. 31, *Ley Núm. 32* (1914), Panama.

⁹⁹ Art. 53, *Ley de Extranjeros*, Venezuela.

¹⁰⁰ Art. 27, *Ley de Extranjeros*, Venezuela. Villegas-Pulido, *op. cit.*, p. 80, writes: "The intervention of the judicial authority would deprive the expulsion of its administrative character: the very essence of judicial functions runs counter to the object sought to be attained by the expulsion, since it would delay its being carried out to the detriment of the interests which the Executive Power seeks to safeguard."

¹⁰¹ Arts. 1 and 8, *Lei Núm. 1,641* (1907), Brazil. Law No. 2,741, of Jan. 8, 1913, revoked Arts. 3 and 4, only paragraph, and 8, of *Lei Núm. 1,641* (*Habeas Corpus de Adelino Gianelli*, *supra*).

This exclusive authority is described in the laws as "administrative and discretionary,"¹⁰² as "administrative and summary,"¹⁰³ and to be exercised "when he may deem it convenient."¹⁰⁴

Under this system it is held that the judiciary are wanting in authority to review the action of the Executive. One case in Brazil¹⁰⁵ considered Article 1 of Law No. 1,641 of 1907, which provides for the expulsion of the alien who endangers the national security or the public tranquillity, and Article 8 which gave the alien recourse only to the authority which issued the order under Article 1—the Executive. The federal District Court in Rio de Janeiro ruled that the judiciary had no jurisdiction "to inquire into detentions carried out by the Executive Power, based on Articles 1 and 8 of the present law of expulsion"; that "the intervention of the Judicial Power in the exercise of this right by the Executive Power would be doubly intolerable, since we are dealing with a right which issues from the national sovereignty and is recognized in a special law"; and finally, that no judicial recourse is available because "a purely discretionary measure or decision of the Executive Power is involved," from which the deportee could appeal only "to the authority which decreed the expulsion."

These views have been endorsed by the Supreme Court of Brazil in the case of the *Habeas Corpus de Vicente Vacirca*,¹⁰⁶ in these words:

The letter of the law is sufficient to answer the question: "The alien who, for any reason, endangers the national security or the public tranquillity, may be expelled from part or all the national territory." (*Dec. cit. of January 7, Art. 1*); "the expulsion shall be individual and in the form of orders, which shall be issued by the Ministry of Justice and Internal Affairs" (*Dec. cit., Art. 5*).

Therefore, the order of the Minister, expelling a deportee, was a legal act, that is, done in virtue of law. It does not appertain to the judiciary to examine the value of the reasons which determined an order which the law expressly authorizes the representative of another power to carry out, for any reason, in behalf or defense of the public security and tranquillity.

These Brazilian cases indicate clearly the care which the courts of Latin America are inclined to show not to invade the province of the Executive when the laws give him exclusive cognizance of the matter of expulsion.

II. Mixed system. This system regards the act of expulsion as an executive function subject to judicial correction. It aims to check administrative action and safeguard individual rights. The alien, however, has no right to judicial interposition in his behalf unless that right is expressly, or by neces-

¹⁰² Art. 54, par. 2, *Ley de Extranjeria* (1906), Honduras.

¹⁰³ Art. 15, *Ley de Extranjeria*, Costa Rica.

¹⁰⁴ Art. 8, *Ley Núm. 48* (1920), Colombia.

¹⁰⁵ *Habeas Corpus de Alfredo Rossi*, *supra*.

¹⁰⁶ 12 *Revista de Direito*, 311, 315. See also, *Habeas Corpus de Rosa Press*, 89 *Revista de Direito*, 63, 69, Brazil.

sary implication, given him in some law. The right is given in Argentina,¹⁰⁷ if he claims a residence; in Brazil, in cases of crimes, vagrancy, beggary, or pimping,¹⁰⁸ or if he claims a domicile,¹⁰⁹ or claims to be, or is entitled to the status of, a citizen; ¹¹⁰ in Chile,¹¹¹ for any reason; in Panama,¹¹² and Peru,¹¹³ if he alleges a domicile; and in Venezuela, if he claims to be a citizen,¹¹⁴ or owns real property.¹¹⁵

After a review of the authorities which subscribe to the theory of executive exclusivism, the Supreme Court of Brazil had this to say on the matter of judicial intervention: ¹¹⁶

However, notwithstanding its general acceptance, our Constitution does not permit us to assent to this principle in the exact terms in which it is announced in other countries.

It is necessary, in order to commend it to our acceptance, to reconcile the discretion of the Executive in deciding upon the occasion or convenience of the measure, with the revisory action of the Judiciary, at least in regard to certain phases which involve the action of the government.

* * *

Cases may arise in which the judicial intervention could be undelinable, at least to hold the Executive within the constitutional limits in which the authority has been granted him.

It cannot be imagined that the Brazilian people, could have offered

¹⁰⁷ In *Habeas Corpus de Francisco Macia, et al.*, *supra*, the Supreme Court of Argentina said: "Article 14 of the Constitution confers upon all the inhabitants of the country, in keeping with the laws which regulate its exercise, the right, among others, to enter, remain, move about and leave Argentine territory. The term 'inhabitant,' which includes nationals as well as aliens, refers to persons who reside in the territory of the Republic with the intention to remain in it, who inhabit it even when they have not established exactly a domicile, with all its legal effects." Vedia (*Constitución Argentina* [Buenos Aires, 1907], Sec. 72, p. 72) writes that the expression "all inhabitants of the country" necessarily comprises citizens and aliens.

¹⁰⁸ Arts. 2 and 8, *Lei Núm. 1,641* (1907), Brazil.

¹⁰⁹ Arts. 3 and 8, *Lei Núm. 1,641* (1907), Brazil. In *Habeas Corpus de Adelino Gianelli*, *supra*, the Supreme Court of Brazil held that "as a matter of law, upon proof of the residence of the alien in accordance with the concept of residence in civil law, there is no room for an expulsion. In all that is said respecting the guarantees of liberty and of individual security given by the Constitution, resident aliens in Brazil are on a footing of equality with natives and naturalized Brazilians (Pedro Lessa, *Do Poder Judiciario*, § 65)."

¹¹⁰ *Habeas Corpus de Rosa Press*, *supra*: "But if a deportee appears before the courts alleging that he is a Brazilian, there is no reason why he should not be protected if he can establish his claim. The Executive is authorized to deport aliens, and he cannot extend the measure to citizens."

¹¹¹ Art. 4, *Ley de Residencia* (1919).

¹¹² In *Habeas Corpus de Len Sen et al.*, *supra*, the Supreme Court said that since petitioners were "domiciled in the country," they had "the right to remain in the Republic according to law."

¹¹³ Art. 1, *Ley de Expulsión de Extranjeros*.

¹¹⁴ Art. 28, *Ley de Extranjeros*.

¹¹⁵ Art. 18, *Ley de Extranjería*.

¹¹⁶ *Habeas Corpus de Rosa Press*, *supra*.

aliens vast rights and guarantees by their Supreme Law, as they really have, and as no other people has, to have them flouted by the Executive without giving the victims protection at the hands of that power set up by the same political system as defender and guardian of the basic principles upon which it rests.

CONCLUSIONS

This brief study yields a number of conclusions which we can briefly recapitulate as follows:

Conclusion I. The traditional policy of Latin America has been, and is, in favor of the free ingress of aliens into those countries.

Conclusion II. Latin American countries, exercising inherent powers of sovereignty, will, if there is a law, and if not, as a measure of high police, exclude or expel aliens for reasons connected with the defense of the state, the social tranquillity, individual security, or the public order.

Conclusion III. There is nothing in the law of nations which forbids the expulsion of the "domiciled" or "resident" alien; but Latin American legislation gives him in this matter a more favored position than to the "transient" alien. The latter can be expelled; the former cannot.

Conclusion IV. The noticeable diversity of views, and the plainly obsolescent character of much of their legislation on the causes of exclusion and expulsion, should lead to a new and broader study of the whole subject in the light of recent developments in the technique of political penetration.

Conclusion V. Judicial interposition should be confined to cases of "public order." The authority of the Executive in cases of "national security" should be exclusive.

Conclusion VI. To maintain the solidarity of the countries of this hemisphere, they should adopt this policy: *Exclusion or expulsion from one should carry with it exclusion or expulsion from all.*

EDITORIAL COMMENT

THE EXECUTION OF HOSTAGES

The repeated executions of civilians seized as so-called hostages by the German military forces in occupied countries and the threat of similar conduct by Japan in the Philippines as reported by General MacArthur, have drawn renewed attention to the aggravated violations of the laws of land warfare in the present conflict. On February 12, 1942, according to reports reaching this country, the German authorities ordered 45 French civilians seized as hostages to be executed unless those responsible for two attacks upon German military personnel in the Occupied Zone were discovered. One of these incidents occurred at Tours where 20 civilians were ordered executed unless the person who attacked a sentinel were delivered up by February 14th; 25 others were to be executed at Rouen if certain persons guilty of throwing bombs were not arrested before February 15th.¹ On March 9, 1942, 20 hostages were executed because persons responsible for the killing of a German sentinel had not been discovered.¹ Other instances have been previously reported. In a communiqué of the United States War Department, based upon information received from the commander-in-chief in the Philippines, the Japanese authorities were reported to have posted orders that hostages would be taken in the event that civilian assailants against the attacking forces could not be found and that the death penalty would be inflicted even for attempts to inflict any injury whatever.²

The use of the term "hostages" in connection with certain military actions by the occupying forces against noncombatants is of comparatively recent origin. Originally the term "hostage" represented a kind of human pledge by one belligerent to another to insure the performance of an agreement. It is recounted that after the Peace of Aix-la-Chapelle in 1748, two British peers, Lord Sussex and Lord Cathcart, remained on parole at Paris until the Cape Breton colony was restored to France.³

If we admit the right of a belligerent to take hostages to insure the good behavior of the civil population, it does not follow that a belligerent has a right to execute the hostages without proof of their personal responsibility for the acts complained of; otherwise the use of the term becomes merely a ruse to mask an ugly act. Even the Romans, who were not particularly celebrated for their consideration toward the inhabitants of occupied enemy territory, recognized the obligation to connect the hostage with the repre-

¹ *New York Times*, Feb. 13, 1942, p. 7; *ibid.*, March 10, 1942, p. 4.

² *Ibid.*, Jan. 15, 1942, pp. 1-2, based upon United States War Department Communiqué No. 59. So far as concerns prisoners of war, reports from Japan were to the effect that the Japanese Government intends to observe the articles of the Geneva Convention of 1929. *New York Times*, Feb. 22, 1942, sec. 1, p. 3. But later, gross violations of these rules by the Japanese at Hong Kong were made public by Secretary Anthony Eden. *Ibid.*, March 11, 1942.

³ T. D. Woolsey, *International Law*, (6th ed.) §110.

hensible act. It is recounted that Scipio in his invasion of Spain had seized hostages taken from the domains of certain Spanish princes. He declared that he would hold the princes themselves responsible for revolts and would not avenge himself upon innocent hostages.⁴

The United States Rules of Land Warfare as set forth in Instructions for the Government of Armies in the Field (No. 54), correctly defines a hostage as "a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war." Again (No. 55), "If a hostage is accepted, he is to be treated like a prisoner of war, according to rank and condition as circumstances may admit." Grotius recognized the voluntary character of the pledge and remarked that even the obligation of fealty and the duty which a vassal owed to the sovereign did not go so far as to subject him to selection as a hostage unless the vassal was also a subject. Grotius maintained that according to the strict law of nations, a hostage could be put to death but that it was not in accordance with moral justice unless the hostage were at fault. The obligation was to be strictly interpreted because it was undertaken for the act of another. Thus hostages given for one purpose could not be detained for another, and if the hostage were taken for the security of a particular person, the death of that person released the hostage.⁵

We have manifestly gone a long way from these ancient and humane conceptions of hostages. Napoleon took hostages during his Italian campaigns as a means of insuring the allegiance of the inhabitants, but the only penalty threatened was deportation to France.⁶ During the Franco-Prussian War, the Germans made it a common practice to take hostages to prevent the wrecking of trains or the destruction of bridges by noncombatants. Threats were made to shoot a number of workmen taken as hostages if the requisitions placed upon the City of Nancy were not complied with in a certain time. This action was condemned by jurists generally at that time, including the German jurist, Geffcken, though approved by the legal advisor to the German General Staff.⁷ The practice of the British forces during the Boer War of putting hostages upon trains to insure the safety of transport was bitterly condemned by James Bryce in a debate in the British Parliament. There is considerable difference of opinion as to the propriety of this practice. Spaight correctly distinguishes between the taking of hostages as a sort of reprisal for injuries inflicted by the civilian population in violation of the laws of war and acts inflicted upon civilians to prevent the enemy from carrying out ordinary hostilities.⁸ Where hostages are marched in front of advancing columns to protect them from attack by opposing armed forces,

⁴ Vattel, *The Law of Nations*, bk. iii, §142, with a reference to Livy, *History of Rome*, lib. xxviii.

⁵ Grotius, *On the Law of War and Peace*, bk. iii, ch. xx, 52-55.

⁶ Hall, *International Law*, (5th ed.), p. 474 note, quoting *Correspondence of Napoleon*, i, i, 323, 327.

⁷ J. M. Spaight, *War Rights on Land*, (1911) p. 406.

⁸ *Ibid.*, pp. 467-468.

there can be no excuse upon the ground of reprisal. The practice has been universally condemned, although during World War I, the Germans were charged with systematically making use of civilians, even women and children, to protect their troops from attack by regular military forces.⁹

The practices with which we are now dealing were all used in Belgium and France by the Germans in aggravated form during World War I. Garner points out that hostages were seized and shot for acts alleged to have been committed by unidentified persons of the civilian population. He stigmatized such practice as "contrary to the most elementary notions of humanity and justice," and condemned it as an entire disregard of the well-established distinction between noncombatants and lawful belligerents and because it resulted in the punishment of innocent persons "for acts for which they could in no way have been justly held responsible."¹⁰

There is no direct mention of hostages in the Hague Rules upon the Laws and Customs of War on Land, but it is provided that "the lives of private individuals must be respected"; also that requisitions in kind or services must be "of such a nature as not to imply for the population the obligation to take part in the operations of the war against their country."¹⁰

Hall recognizes a right to take hostages to insure the payment of contributions or compliance with requisitions; also as a guarantee against insurrection or as a protection against special dangers to occupying forces. But this right, under a usage which has long become obligatory, is subject to the obligation to treat such hostages in all respects as prisoners of war and not to take their lives except during an attempt to escape.¹¹

This is precisely the point at which a sharp distinction should be made between the possible justification for the taking of hostages to insure the compliance by a restive population in order to promote the maintenance of order, and the execution of such hostages where the perpetrators of particular acts of violence against the occupying forces cannot be found. The extension of the practice of executing hostages during the present struggle calls for a determined outcry against a practice which violates the most elementary conceptions of justice and humanity. Unless condemned, it is likely to continue and expand under the compromising phrase: "usage of land warfare." The prophecy of Hyde that the occurrences of World War I pointed to the use of this practice as a "weapon likely to be employed by a despot to check interferences of any sort with ruthless and cruel acts inspired by caprice," has been fully realized in World War II.¹²

The execution of hostages under the circumstances with which we have

⁹ J. W. Garner, *International Law and the World War*, (1920), Vol. 1, pp. 306, 311. See also C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, (1922), Vol. 2, §700.

¹⁰ Arts. 46, 52. The Hague Convention of 1899 and the Regulations annexed to the Convention of 1907 are identical so far as concerns the quotations here given.

¹¹ Hall, *ut cit.*, p. 418.

¹² Hyde, *ut cit.*, § 700.

now become familiar has ceased to have any character of preventive retaliation and becomes part of a régime of terror. As in the case of all violations of the laws of war affecting human life, one is confronted with the seemingly hopeless task of accomplishing during the continuance of the war anything which is either satisfying with reference to violations already committed or constructive for the future. On the other hand, the correction of these evils should be proclaimed a major objective, as indeed Mr. Churchill declared it to be before the House of Commons on October 25, 1941. The principle of individual responsibility to be followed by drastic punishment should be proclaimed against those of whatever rank who have ordered or carried out executions *en masse* of the civilian population or against innocent hostages.

A distinctly hopeful sign of a growing international opinion in this direction was the adoption of a series of resolutions on January 13, 1942, by representatives of nine European governments-in-exile, meeting in St. James's Palace in London. These resolutions declare the execution of hostages to be a part of a régime of terror and the governments agree, among other things, "to place amongst their principal war aims, punishment through the channel of organized justice, of those guilty and responsible for these crimes, whether they have ordered them, perpetrated them, or in any way participated in them."¹³

International criminal jurisdiction for the punishment of war crimes has been often discussed but never carried to the degree of practicable acceptance. The futile efforts made in this direction at the Paris Peace Conference and in certain articles of the Treaty of Versailles will be remembered. Even as late as December, 1921, Mr. Elihu Root favored the idea of a general agreement upon an international criminal code under which individuals such as submarine commanders could be held personally responsible for illegal acts and could be brought to trial in any country of the world. He felt that the Peace Conference had missed a great opportunity by failing to establish this procedure.¹⁴ In this connection it is to be noted that when once set up, such procedure will not attempt to indict or punish nations or communities, but the individuals responsible for giving the illegal orders or for their execution.

It will require the existence and successful enforcement of such a system over some period of time before its deterrent effects upon forces operating under ruthless military discipline can be expected. Unless the termination of the present war witnesses positive action along these lines, the false concept that noncombatants in occupied areas are completely subject to the ruthless will of the conqueror will have taken another fatal step toward realization.

ARTHUR K. KUHN

¹³ *New York Times*, Jan. 14, 1942, p. 6. The nine nations were Belgium, Czechoslovakia, Free France, Greece, Luxemburg, Netherlands, Norway, Poland and Yugoslavia. China sent a message condemning Japanese conduct in parallel terms. China and Soviet Russia were represented by observers.

¹⁴ P. C. Jessup, *Elihu Root*, (1938), Vol. II, p. 454.

EXTRATERRITORIAL CONFISCATIONS

The United States Supreme Court has just rendered a decision admitting the validity of Soviet confiscations of property located in the United States belonging to Soviet dissolved Russian corporations.¹ In so doing, the court has upset and parted with international law, as heretofore understood, gravely impaired or weakened the protection to private property afforded by the Fifth Amendment of the United States Constitution, endowed a mere executive agreement by exchange of notes with the constitutional force of a formal treaty, misconstrued the agreement, and, it is respectfully submitted, confused that foreign policy of the United States in whose alleged support this revolutionary decision was thought necessary. The main cause of the trouble lies in the extraordinary legal effects attributed to American recognition of the Soviet Government in 1933, which, it was assumed, "validates" all prior illegalities.

The case arose out of the following circumstances: The New York branch of the First Russian Insurance Company had operated profitably as an autonomous insurance company since 1907, but in 1925, seven years after the Soviet dissolution of the parent Russian company, it was ordered liquidated by the New York courts. Its funds were ordered distributed first to the domestic creditors and then to foreign creditors and the Board of Directors for eventual distribution to stockholders.² After satisfying the New York policyholders and creditors of the company, there was left in the hands of the New York Superintendent of Insurance, as liquidator, a fund of over one million dollars. By 1933, some distribution to foreign creditors had taken place. The remaining fund, whose further distribution was ordered stayed, became the object of a contest between the United States Government and the Superintendent of Insurance acting on behalf of non-New York policyholders, creditors and stockholders.

The United States Department of Justice in 1934 began a suit, relegated to the New York courts,³ alleging title to the fund to be vested in the United States Government by virtue of the supposed terms of the Litvinoff assignment of November 16, 1933, by which the United States became the assignee, "preparatory to a final settlement of the claims and counterclaims"⁴ of the two governments and of their nationals, of Soviet assets in the United

¹ *United States v. Pink*, Superintendent of Insurance, 62 Sup. Ct. 552 (1942), decided Feb. 2, 1942, this JOURNAL, *infra*, p. 309.

² *Matter of People*, 255 N. Y. 415 (1931).

³ *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 481 (1936).

⁴ The nearest that the two governments ever came to a settlement of claims is found in the following Joint Statement issued by the President and M. Litvinoff, Nov. 16, 1933:

"In addition to the agreements which we have signed today, there has taken place an exchange of views with regard to methods of settling all outstanding questions of indebtedness and claims that permits us to hope for a speedy and satisfactory solution of these questions which both our governments desire to have out of the way as soon as possible.

"Mr. Litvinoff will remain in Washington for several days for further discussions." [This JOURNAL, Supplement, Vol. 28 (1934), p. 11.]

States; the Soviet Government was to take no steps "to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due to it, as the successor of prior governments of Russia, or otherwise, from American nationals . . . and also the claim against the United States of the Russian Volunteer Fleet," some of whose ships had been requisitioned by the United States.⁵

If there was any intention by this assignment to recognize a Soviet title to supposedly confiscated American-situs private property, it is certainly not apparent in the words used. The claims that were assigned were public claims and funds due or found due by decisions of United States or State courts to the Soviet Government, as successor to prior Russian governments, from American nationals or the United States Government. The assignment clearly covered a fund that had been deposited in the Treasury as a result of the suit of Serge Ughet, Financial Attaché, on behalf of the Russian State against the Lehigh Valley Railroad arising out of the Black Tom explosion,⁶ a claim which would have been outlawed but for the understanding to let the suit continue under an arrangement between Ughet and the Treasury to deposit the proceeds in the Treasury pending formal recognition of a future Russian Government which might lawfully claim the fund. The express mention of the claim of the Russian Volunteer Fleet for requisitioned vessels⁷ explains on the principle of *ejusdem generis* the exact type of Russian credits the signatories of the notes had in mind and the limited meaning to be attributed to the phrase "or otherwise," which alone would have to bear the burden of carrying the portentous assertion that Soviet Russia regarded as an American asset capable of assignment its supposed claims upon *Russian* corporations and nationals arising out of the confiscatory decrees of 1918, claims of a type which no foreign country had ever admitted. It was only claims of the Russian Government against the United States or *American nationals* that were assigned; it was suits and judgments of that kind—the only ones instituted—that the Russian Government agreed to suspend and waive.⁸

There were with the President when the Soviet negotiations of 1933 were undertaken; representatives of the Department of State; it is inconceivable, in view of their knowledge of the steadfast refusal of American courts to give effect to the Soviet confiscatory decrees in their supposed application to American-situs property,⁹ that they would not have made plain, had they

⁵ The Roosevelt-Litvinoff exchange of notes is printed in this JOURNAL, Supplement, Vol. 28 (1934), pp. 1-11.

⁶ *Lehigh Valley R. R. v. State of Russia*, 21 F. (2d) 396, 401 (1927), *cert. denied*, 275 U. S. 571 (1928).

⁷ 282 U. S. 481 (1931).

⁸ The claim arising out of the United States expedition against Siberia was separately waived by the Soviet Government.

⁹ Connick in (1925) 34 Yale L. J. 499; Borchard, this JOURNAL, Vol. 31 (1937), p. 675; Jessup, *ibid.*, p. 481; see also *Guaranty Trust Co. v. United States*, 304 U. S. 126 (1938), this JOURNAL, Vol. 32 (1938), p. 848; *United States v. Moscow Fire Ins. Co.*, 280 N. Y. 286 (1939), 309 U. S. 624 (1940).

so intended, their desire to reverse this uniform rule of law, universally applied, and now lay claim as assignee to such purportedly confiscated property. The complete silence of the negotiations on this crucial point is the best evidence that the Executive was making no such revolutionary claim or demand. No such suits were pending to which the Russian renunciation or waiver could apply. Chief Justice Stone in the *Pink* case is correct in reaching the conclusion that the majority, in assuming that Russian confiscated property was included in the assignment, is without evidential support. It is an assumption contrary to fact.

In 1934 the United States Department of Justice, with or without consultation with the Department of State, in a thrifty desire to corral as much money for the Treasury as possible, began a series of suits in the New York and other local courts, as assignee of Soviet Russia, to recover supposedly confiscated Russian funds held by American banks and other stakeholders. So uncertain was the Government whether the Russian Government had purported to confiscate such funds and assign them to the United States, that in 1937, possibly in connection with the Belmont case,¹⁰ the United States *chargé d'affaires* in Moscow asked the Soviet Government the ambiguous questions (a) whether under Soviet law the Soviets had acquired the right to dispose of Russian corporation assets abroad; (b) whether the Soviets had undertaken to assign amounts due from American nationals not only to the central Union but to the constituent republics of the Soviet Union; (c) whether the claim of the Russian Volunteer Fleet against the United States was assigned; and (d) whether the Soviet Union had assigned to the United States all amounts due it from American nationals. This inquiry as to Soviet law and Soviet intentions reiterates the obvious as to (c) and (d), but conspicuously omits the direct question whether the American assets of Russian corporations had actually been assigned to the United States. That the Department of Justice was doubtful as to Russian law and intentions—not to speak of American law and intentions—shows the whole claim to have been an afterthought, although the New York Court of Appeals had in 1940 in the Moscow Fire Insurance case concluded, contrary to apparently later expert opinion, that Russia had no intention to confiscate American-situs but Russian-owned private property, and that it was contrary to New York public policy to give effect to a foreign confiscatory decree in its application to such property. This the New York Court of Appeals and other courts throughout the world¹¹ had consistently held, not always on the right ground,¹² but nevertheless consistently. The correct ground, it is submitted, is that a Russian confiscation of New York property is beyond the jurisdiction and power of Russia, that American and other western courts have regarded such pur-

¹⁰ *United States v. Belmont*, 301 U. S. 324 (1937); this JOURNAL, Vol. 31 (1937), p. 537; 51 Harv. L. Rev. 162, 47 Yale L. J. 292.

¹¹ Cf. *Nebolsine* in 39 Yale L. J. 1130 (1930).

¹² *Supra*, n. 9.

ported foreign confiscation as repugnant to American and western public policy, and that recognition or non-recognition of the Soviet Government has nothing whatever to do with this question.¹³

The majority of the Supreme Court, however, supplied the necessary rationalization to sustain this new confiscatory policy foisted on the United States by the Department of Justice. They assumed their own major premise that the Litvinoff assignment had transferred to the United States the proceeds of Russian confiscations. This was attributed to the President as an incident of his supposed power "to determine the foreign policy of the United States with respect to Russian nationalization decrees," even though this result in imposing on the States the obligation to set aside their own public policy against confiscation; that the President must have the power to determine the policy which is to govern the question of recognition, and that recognition may be "conditional," apparently conditional on supposedly conceding—unasked—the validity of Russian confiscations and becoming a receiver of "confiscated" goods; that he has the power to eliminate "all possible sources of friction" between "these two great nations," which apparently confiscation removes, although for sixteen years confiscation was the *obstacle* to recognition of Soviet Russia by the United States. "Unless this power" (to confiscate as incidental to settling claims) "exists, the power of recognition might be thwarted or seriously diluted"—a novel conclusion. So, in the noble pursuit of recognition and of settling claims of American citizens against Russia, the President must be allowed by executive agreement to confiscate or become the assignee of the Russian confiscation of private property. Certainly this is a revolutionary doctrine, a unique non-sequitur, not really to be found in the Litvinoff assignment.

Moreover, this great solicitude for American claims is misdirected. Whereas the assignment of Russian Government credits was "preparatory to the final settlement of claims"—amounting to 300 to 400 million dollars—and the Congress actually provided for the appointment of a commissioner to examine the validity and amount of the claims,¹⁴ the fact is that the policy of extending recognition *before* provision for the settlement of claims and accepting instead a mere Soviet promise to settle,¹⁵ has resulted in a practically complete sacrifice of the claims of American citizens. The few paltry dollars—probably not over two millions—which might now come into the Treasury because of Soviet confiscations,¹⁶ always heretofore denounced as so contrary to international law as to bar recognition, but now evidently

¹³ *Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220 (1933); *Vladikavkazsky Ry. Co. v. N. Y. Trust Co.*, 263 N. Y. 369 (1934). E. G. Lorenzen, "Territoriality, Public Policy and the Conflict of Laws" (1924), 33 Yale L. J. 736, 748 *et seq.* Our courts would not even enforce foreign penal and tax laws.

¹⁴ 53 Stat. L. 1199 (Aug. 4, 1939).

¹⁵ *Supra*, n. 4.

¹⁶ It seems strange for Justice Douglas to assume that the proceeds of such Russian-American confiscations could make the United States and its nationals "whole" (Opinion, p. 14), 82 Sup. Ct. 552 at 565.

purified because the United States is the beneficiary of the confiscation, stand in no serious relation to the vast claims of American citizens arising out of Russian confiscations, claims which by the doctrines announced by the Supreme Court in the Pink case are, as we shall see, apparently nullified.

In this effort at rewriting the foreign policy of the United States, the Supreme Court had to find that before the assignment to the United States, Soviet Russia had by Russian law and American law become the owner of the American assets of dissolved Russian corporations. Expert testimony was accepted in the form of self-serving declarations of a Soviet official to the effect that Russia had intended to confiscate the property. But how to overcome the public policy of the forum which denied legal effect to foreign confiscations of American assets? This feat was accomplished by maintaining that Justice Sutherland in his dictum in the Belmont case had already foreclosed the question by asserting that mere repugnance of the Soviet decrees to the public policy of the forum was no ground for denying them effect *after recognition*.¹⁷ Thus, "recognition" had to bear the full burden. The Supreme Court assumed, presumably on the basis of an argument made by the Government in the Guaranty Trust case,¹⁸ that "recognition of a foreign sovereign conclusively binds the courts and 'is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence.'"¹⁹ Nothing could be further from the truth. "Recognition validates nothing," as John Bassett Moore has remarked.²⁰

The mistake stems from an error of Mr. Justice Clarke in *Oetjen v. Central Leather Co.*,²¹ in which it was merely necessary to say that the recognition of a successful revolution in Mexico made that revolutionary government responsible for its official acts from the beginning of the revolution, or better still, that the seizure by a *de facto* government of property within its territorial jurisdiction and under its control cannot be re-examined as to its legality by the courts of a foreign country, where it becomes a diplomatic question. What Justice Clarke actually said was that "when a government

¹⁷ The Belmont case (*supra*, n. 10) had held that the United States had a cause of action arising out of the Litvinoff assignment, but left open the question whether the assignment to the United States would prevail over adverse claims of private creditors or owners. This question the Pink case decided in the affirmative. Because the Belmont case had not so decided, Chief Justice Stone, dissenting, considered the Belmont case as not determinative of the present issue.

¹⁸ In its brief in that case the United States had argued (p. 32) that the recognition of Russia in the executive agreement "retroactively validates the acts of the government recognized from the time of its inception." See W. B. Cowles, "Treaties and Constitutional Law: Property Interferences and Due Process of Law," Washington, 1941, p. 279. Justice Sutherland had assumed this error to be a fact in the Belmont case, and it was quoted as gospel by Justice Douglas in the Pink case.

¹⁹ *United States v. Belmont*, 301 U. S. at 328; *United States v. Pink*, *supra*, n. 1, at p. 562.

²⁰ (1937) 50 Harv. L. Rev. 395 at 431.

²¹ 246 U. S. 297 (1918); this JOURNAL, Vol. 12 (1918), p. 421.

which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence." As John Bassett Moore remarks,²² "by no law, national or international, can such a statement be justified."

By the legerdemain of a dictum of Justice Sutherland, this comparatively innocuous misstatement of Justice Clarke, applying to the responsibility of governments resulting from successful revolutions, is now distorted into the important conclusion that recognition *validates* the confiscatory acts of the Soviet Government and requires New York and other State and Federal courts to give the confiscation legal effect, notwithstanding their public policy to the contrary. Even the full faith and credit clause of the Constitution, as Chief Justice Stone remarks in dissent, cannot force the local courts to accept foreign property doctrines that are repugnant to the public policy of the forum.²³ By disregarding the Russian confiscatory decrees the New York courts were curiously assumed to be giving extraterritorial effect to New York law, whereas by the presidential recognition of Soviet Russia New York was held to be obliged to surrender New York law and give extraterritorial effect to Russian law in a matter—validating Russian confiscations—which Russia had not actually requested or exacted or the President conceded in the executive agreement. On the other hand, it is elementary that a nation or state need not give effect to the law or judgment of a fully recognized foreign country if it conflicts with the law or public policy of the forum.²⁴ The difficulties entailed by Soviet confiscations, which Justice Frankfurter in the *Pink* case seemed to think were now clarified and dissipated, are worse confounded than ever.

Nor is this all. In order to sustain what was thought to be an exercise of presidential power, the Supreme Court has had to conclude that an executive agreement could nullify the protection of the Fifth Amendment. Even a treaty is subject to the United States Constitution. Now, by executive agreement, as interpreted by the Supreme Court, the President is held authorized to confiscate the private property of Russian corporations and its creditors, American and foreign, without authority of Congress. Even in time of war, remarked Chief Justice Marshall in *Brown v. United States*,²⁵ Congress alone can decree confiscation, which he later regarded as a violation of international law.²⁶ Now the Supreme Court attributes to the President alone, in time of peace, this power and right. To do that, they are

²² *Supra*, n. 20.

²³ *Fischer v. American United Life Ins. Co.*, 62 Sup. Ct. 380 (1942), decided Jan. 5, 1942. *Clark v. Williard*, 294 U. S. 211 (1935).

²⁴ Cases cited and discussed in Lorenzen, *supra*, n. 13.

²⁵ 8 Cranch 110 (1814).

²⁶ *United States v. Percheman*, 2 Peters 51 (1833).

also obliged to conclude that there is no difference in the predominance over State law of a "treaty, or international compact or agreement," although the Constitution speaks only of "treaties" as the supreme law of the land. It is now in the fashion to extol the executive agreement as an exemplification of democracy as opposed to the so-called undemocratic requirement of a two-thirds vote in the Senate.²⁷ However, the Supreme Court should not encourage this subversive propaganda. Nor does it follow that because the Fourteenth Amendment permits a State under certain circumstances to give preference in bankruptcy to domestic creditors over foreign creditors whose claims arise abroad,²⁸ therefore the Fifth Amendment permits the United States to demand a preference for itself and its nationals over the owners and creditors, not of a bankrupt estate, but of foreign private property against the national government of which and *not* against the owners or creditors of which it has claims. By the same token, even the domestic creditors of the foreign concern can be wiped out, notwithstanding the Fifth Amendment, for the executive agreement, now apparently given the constitutional force of a treaty, is said to prevail over any State law protecting private property. Thus, an executive agreement can apparently, although not avowedly, abrogate the Fifth Amendment. It is all very weird.

Moreover, other matters warrant consideration. For many years one Secretary of State after the other castigated the Russian confiscations of American property, and the United States refused to recognize the Soviet Government until an arrangement was made for the settlement of the claims.²⁹ An executive agreement of 1933 promised to make settlement of these claims.³⁰ Yet, if the Supreme Court is to be believed, recognition had the catalytic effect of validating the illegal acts of the Soviet Government, so that the confiscations are now legal not only as to property in Russia but *mirabile dictu* as to property in the United States. Thus, by a stroke of the judicial pen, \$300-400 millions of claims against Russia have had the bottom knocked out of them, because forsooth the United States has by recognition become so tolerant of what it once denounced as immoral and intolerable that it has made itself the beneficiary of these very confiscatory acts. In dealing with the confiscation of foreign-owned property by domestic sovereigns courts have considered themselves incompetent to pass upon their legality, leaving it to the Department of State to debate with the foreign confiscating government the issue of legality. Now, in the more extreme case of a purported Russian confiscation of property having its situs in the United States, the Supreme Court undertakes not only to pass upon the

²⁷ Cf. Wallace McClure, *International Executive Agreements*, N. Y. 1941, and review in 42 Col. L. Rev. (April, 1942).

²⁸ *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570 (1908). But cf. *Blake v. McClung*, 172 U. S. 239 (1898).

²⁹ Cf. C. P. Anderson, this JOURNAL, Vol. 28 (1934), p. 90. 1 Hackworth's *Digest*, 302 *et seq.* *Foreign Relations, 1920*, III, 467; *ibid.*, 1923, II, 755, 762, 788.

³⁰ *Supra*, n. 4.

legality of a foreign confiscation but to validate it because the foreign country has been recognized, and this notwithstanding the fact that the Department of State both before and since recognition has insisted upon the illegality of the confiscation. This is done, not for the benefit of the United States, but for the benefit of American claimants against Russia, who presumably will some day receive a token payment derived from these assets. Thus, the private property of A is taken to pay a foreign country's debt to B, a device heretofore thought immoral and unconstitutional.

The Department of Justice could hardly have foreseen the difficulties and dilemmas it would create for the United States by bringing these suits. In the face of the new confiscatory decrees likely to emanate from European governments, it will be interesting to observe the fate of the current decision in the Pink case.

EDWIN BORCHARD

THE LITVINOV ASSIGNMENT AND THE PINK CASE

Previous adventures of the Litvinov assignment before the Supreme Court of the United States have been discussed in this JOURNAL.¹ *United States v. Pink*² is a landmark in the history of this executive agreement and of the court's rulings on the power of the President in conducting foreign relations. From the point of view of our constitutional law, the decision may well mark one of the most far-reaching inroads upon the protection which it was supposed the Fifth Amendment accorded to private property.³ The effect of the decision may be illustrated by imagining—a most improbable case—that in the settlement of the present war after the defeat of the Axis, the United States by executive agreement might take an assignment from the German Government of that government's claim to the confiscated properties of their Jewish citizens and of the citizens of the occupied countries, including all choses in action in the United States and fines imposed upon persons physically present in this country. The purpose of the United States, let us assume, would be to provide a fund for pensions of disabled soldiers and sailors or merely to avoid the international disruption likely to follow the imposition of huge "reparations" payments. Under the rationale of the Pink decision, the United States could, under such an assignment, take to itself all such private properties and no American court could protect the owners. I am far from suggesting the likelihood of any such seizure of the property of afflicted peoples who have happily found refuge and official

¹ Vol. 31 (1937), pp. 481 and 675; *ibid.*, p. 542.

² 62 Sup. Ct. 552; this JOURNAL, *infra*, p. 309.

³ Cf. Cowles, *Treaties and Constitutional Law: Property Interference and Due Process of Law* (1941), esp. pp. 288-289. The brief on behalf of the Association of American Creditors of Russia, as *amicus curiae*, points out that American citizens, holders of claims against Russia, will be the ultimate beneficiaries. This would of course be immaterial from the constitutional point of view if other persons were actually entitled to the property.

stitute an agreement "no longer to question" the Soviet nationalization decrees; recognition or non-recognition has no such implication. If the court means by "policy of recognition" the Litvinoff assignment or attendant formally signed agreements, it could have avoided much confusion by saying so. A few sentences later, the court says that the New York courts' decision "amounts to official disapproval or non-recognition of the nationalization program of the Soviet Government. That disapproval or non-recognition is in the face of a disavowal by the United States of any official concern with that program." Under established conflicts of law rules,⁹ the New York courts might equally refuse to enforce the tax or penal laws of Great Britain and this would not be construed as "official disapproval" of the British fiscal or penal program;¹⁰ but here the New York courts actually did invoke the conflicts doctrine of "public policy." Although the Chief Justice in his dissent points out the inapplicability of the Belmont case to the Pink case, the majority holds it practically controlling. Both cases seem to support a doctrine that when a State court considers applicable the conflicts rule which leads them to consider the policy of the forum, the State court must look to the Federal Government to ascertain what that policy is, at least if any international or other type of federal question is involved.¹⁰ In the abstract, this is a sound result; yet the language of the majority and concurring opinions could be stretched, *e.g.*, to argue against the mooted question of the right of a State to tax the property of a foreign sovereign allied with the United States in war. Moreover, one can hardly say that the Federal Government adopted as the public policy of the American forum the rule that all Soviet laws should be executed by American courts, nor is this result reached by saying that the United States agreed "no longer to question" those laws or that the United States disavowed "any official concern with that program." The United States could,

⁹ But see Leflar, "Extrastate Enforcement of Penal and Governmental Claims," 46 *Harvard Law Review* (1932), p. 193.

¹⁰ On this point see the decision of the Appellate Division of the New York Supreme Court in *Bollack v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France*, March 27, 1942, *New York Times*, March 28, 1942. The court remarked by Townley, J., in sustaining the argument that it was against the public policy of New York to enforce a decree of the Vichy Government which expatriated the plaintiff and confiscated his property: "The only cases which have given validity to confiscatory decrees are cases arising under the Litvinov assignment. . . . The effect of these decisions [Belmont, Pink and Manhattan Co. cases] is that the Litvinov assignment and the title acquired thereunder must be given effect regardless of any local public policy to the contrary."

¹¹ *Department of State Bulletin* (Vol. VI, p. 146, Feb. 7, 1942) summarizes the decision in the Pink case under the caption, "Supremacy of Federal Policy over State Policy in Matter of Recognition of Foreign Government." Cf. the excellent note "Foreign Funds Control Through Presidential Freezing Orders," in *XLII Col. Law Rev.* (1941), 1039, at 1056 and note 101; also "Protective Expropriatory Decrees of the Governments in Exile—Their Application in the United States," *ibid.*, 1072, at 1087, note 104. See also "The Doctrine of the Erie Railroad v. Tompkins Applied to International Law," this JOURNAL, Vol. 33 (1939), p. 740.

however, by treaty or probably even by executive agreement, undertake to execute here the revenue laws of a foreign state and such an agreement would be binding on State courts. We have gone beyond the too narrow view of our Constitution which is represented by Secretary Hughes' refusal to sign the Convention on the Bustamante *Code of Private International Law* at Havana in 1928.¹¹

The court is careful to say that it expresses no opinion upon the question whether respect should be paid to the New York policy of protecting "local creditors," since all claims which arose out of dealings with the New York branch had been paid; but the language of the opinion seems clearly to indicate that the same result would be reached in regard to local creditors, and that regardless of the question whether they were aliens or citizens.

As already indicated in this comment, the effect of the Pink case may well prove to be salutary in the disposition of the mass of litigation which could have been anticipated as a result of the so-called nationalization decrees of the Dutch and Norwegian Governments, now in exile.¹² The fact that this opinion has been handed down at the threshold of what might well have proved to be a flood of litigation may fend off many actions. In this respect, the situation is far better than that which confronted the courts when the maze of Russian cases descended upon them, beginning with the Wulfsohn and Cibrario cases in 1923.

It would seem to be clear *in limine* that the policy of the United States is to support the governments in exile and to defeat the attempts of the occupying forces to secure control of assets belonging to those governments or to their nationals. This policy was established by the freezing orders¹³ and is merely fortified by co-belligerency. In regard to the effect to be given the decrees of German occupying authorities,¹⁴ Justice Pecora, of the Supreme Court of New York, has declared:

The Government of the United States has refused to recognize the German military control of Holland. Any decrees by this unrecognized occupying force would not have the "force and effect of mandates of a lawful sovereign." . . . In withholding recognition of the Nazi regime in continental Netherlands, the Government of the United States has made a determination of policy which our courts should follow. Therefore, any German decrees promulgated in the Netherlands should be given no force or effect whatever in the determination of questions involving property in this State.

¹¹ See Hudson, "The Treaty-Making Power of the United States in Connection with the Manufacture of Arms and Ammunition," this JOURNAL, Vol. 28 (1934), p. 736.

¹² Cf. Domke, "International Aspects of European Expropriation Measures," 22 *Proceedings American Foreign Law Association* (1941), and last footnote, *supra*.

¹³ See *Anderson v. N. V. Transandine Handelmaatschappij et al.*, 28 N. Y. Supp. (2d) 547; *aff'd.* N. Y. L. J., Nov. 15, 1941, p. 1513.

¹⁴ *Amstelbank, N. V. v. Guaranty Trust Co.* (1941), 31 N. Y. Supp. (2d), 194, 199. To the same effect, see *Koninklijke Lederfabriek "Oisterwijk," N. V. v. Chase National Bank*, 177 Misc. 186; *aff'd.* N. Y. L. J., Dec. 20, 1941, p. 2070.

Moreover, in these cases there is so far no conflict between the policy of New York and of the Federal Government, the State policy having been likewise declared in statutory form in a sense hostile to the decrees of German occupying authorities.¹⁵

The other side of this picture is presented where a plaintiff seeks to have a New York court give extraterritorial effect to a decree such as that of the Netherlands Government¹⁶ "nationalizing" certain Dutch assets to protect them from the Germans. While such a case raises other questions, the attitude of American courts should not be basically different. That is the position taken in the already much cited opinion of Mr. Justice Shientag in the Transandine case:¹⁷

The Netherlands Decree is a measure of protection, not of expropriation. Its purpose is to conserve, not to confiscate; to protect the rights of the individual, not to destroy them. . . . The public policy of the United States . . . squarely supports the declared purpose of the Netherlands Decree. . . . The considerations already presented justify the conclusion that the Decree is a valid exercise of the sovereign power of the Netherlands, that it covers the property here sought to be attached, that as between the Netherlands nationals concerned and the State of the Netherlands it vests title to such assets in the State of the Netherlands, and that, since the public policy of the Decree is in harmony with the public policy of the forum, the Decree should be upheld by our courts under the principles of comity.

Mr. Justice Atkinson, in the case of *Lorentzen v. Lydden & Co., Ltd.*,¹⁸ came to similar conclusions relative to the comparable Norwegian Order in Council of May 18, 1940. He quoted at length from the Transandine case and stressed the fact that the Norwegian decree was not confiscatory and "England and Norway are engaged together in a desperate war for their existence. Public policy certainly demands that effect should be given to this Decree."¹⁹

¹⁵ See Williamson Act, N. Y. Laws, 1941, c. 150; also amendments to Secs. 474, 978 of N. Y. C. P. A. (June 2, 1939); amendment to Sec. 269 of the N. Y. Surr. Ct. Act (April 24, 1939).

¹⁶ The Dutch decree of May 24, 1940 is printed in C. C. H., *War Law Service*, Foreign Supplement, § 67, 154 (1941).

¹⁷ *Supra*, note 13. To the same effect, see *Gruenbaum v. N. V. "Oxyde" Maatschappij voor Ersten en Metalen*, N. Y. L. J., Aug. 27, 1941, p. 439; *Duesterwald v. Ladewig*, *ibid.*, Jan. 15, 1942, p. 215.

¹⁸ King's Bench Division, Dec. 19, 1941, not yet reported.

¹⁹ Apparently the same Norwegian decree was also given extraterritorial effect by the Supreme Court of Gothenburg, Sweden, in March, 1942. The suit was for the possession of ten Norwegian ships in Swedish waters, which had been taken over by the Norwegian Government in London and chartered to the British Government. The original Norwegian owners, still resident in German-occupied Norway, sought to oust the British officers and crews and to obtain possession. In rejecting their claims, the Swedish Supreme Court seems to have relied in part upon the defense of sovereign immunity which apparently was raised by the British Government; the full text of the decision is not yet available. See American Swedish News Exchange, Inc., Release No. 32, Oct. 29, 1941; Release No. 52, March 18, 1942; Release No. 53, March 25, 1942.

Our courts have not yet decided whether such decrees will be given effect as against our own citizens who may assert an adverse title. The facts that the decrees in question are not confiscatory and are not abhorrent to the policy of the forum are not decisive, but at least they prevent the earlier Russian cases from exercising a controlling influence, even aside from the deadly wound inflicted upon those "products of casuistry" by the Supreme Court in the *Pink* case.

PHILIP C. JESSUP

QUESTIONS RELATING TO IRISH NEUTRALITY

The position of Éire as a neutral in the present war has evoked discussion of both legal and political questions. Speculation continues as to whether the government of Mr. de Valera will consent to the use, by enemies of Germany, of the now greatly needed ports which Great Britain handed back to Éire in accordance with the Anglo-Irish accord of 1938.¹ The undeviating official attitude of the Prime Minister in Dublin on the matter of partition has actuated the whole policy of Southern Ireland's neutrality.² It has tended to force into the background the realization that the Irish as a free people have clearly a stake in the victory of the anti-Axis Powers, and that they could hardly expect to escape complete domination from a victorious Nazi Germany. Some of the incidents which have occurred, particularly the most recent ones touching Irish-American relations, require examination in the light of this central fact.

At the outset the status of Irish citizens in Great Britain had to be settled, especially in connection with compulsory military service. The issue was handled by allowing exemption to any British subject not an ordinary resident in the United Kingdom, who was, under the legislation of a dominion a national or citizen thereof, who was born in or is domiciled in some part of the Commonwealth of Nations outside Great Britain.³ This left undisturbed the legal principle that a subject of the King born in any of the dominions remains a subject,⁴ while it helped to minimize the difficulties with Éire.

When the issue arose of applying the British Military Training Act in Northern Ireland, there was need for administrative discretion. At a special meeting of the Dail, the Prime Minister of Éire, with the support of the Opposition, took a strong position against the proposal to apply the legisla-

¹ *Cmd.* 5728.

² See editorial comment, "The Neutrality of Éire", this JOURNAL, Vol. 34 (1940), pp. 125-127.

For a statement on the Irish Labor Party's endorsement early in the war of the neutrality policy, see the *Dublin Evening Mail* for April 16, 1940.

³ A. B. Keith, "The War and the Constitution," *Modern Law Review*, Vol. IV, pp. 1, 16-17 (July, 1940). On the number of Irish young men in England and Scotland affected by the legislation, see the *Manchester Guardian Weekly*, March 15, 1940, 209.

⁴ *Isaacson v. Durant*, 17 Q. B. D. 54 (1886). An exception would be a case where claim to allegiance has been relinquished by treaty.

tion in Ulster. The Prime Minister in Belfast denied Mr. de Valera's claim to speak in the name of the people of Northern Ireland. Mr. Churchill finally stated in the House of Commons on May 27, 1941, that, "We have made a number of inquiries in various directions, with the result that we have come to the conclusion that at the present time, although there can be no dispute about our rights or about the merits, it would be more trouble than it is worth to enforce such a policy."⁵ The outcome is said to have been noted with satisfaction in Éire as indicating a first step to the process of transferring Northern Ireland to the control of Éire.⁶

In the meantime, the government at Dublin sought to discharge the ordinary obligations of a neutral. British aviators who had made forced landings in Southern Ireland were interned, and some R.A.F. men who escaped from internment were retaken.⁷ Replying to a question in the Dail on April 30, 1940, Mr. de Valera expressed his belief that reports of unfriendly references to Ireland in German broadcasts were unfounded.⁸ When, early in 1941, bombs were dropped on Dublin, the Department of External Affairs found upon investigation that the bombs were of German origin. After the Irish *chargé d'affaires* at Berlin had been instructed to make energetic protests and to ask assurance that there would be no recurrence, the German Government seems to have admitted some bombings, but denied others.⁹ Some six months later, when bombs were again dropped, the German Government apparently admitted liability and said that it would make full reparation.¹⁰

With the defeat of France, and greater submarine activity in the Atlantic, British need for facilities at Berehaven, Cobh (Queenstown) and Lough Swilly became more acute. Explaining his fear that, if the British were given naval bases in Éire the Germans would bomb Dublin, Cork and other Irish cities, Mr. de Valera declared in November, 1940, that the British could not have the use of the ports for naval bases under any conditions. He vigorously denied that Nazi submarines were being allowed to fuel or provision in the ports. About the same time, in the Canadian House of Commons, the Conservative Leader, Mr. Hanson, advocated a personal appeal to Mr. de Valera for lease of the ports to Canada. He further suggested that support of the United States be sought in the matter.¹¹

⁵ *Parl. Deb.*, 5th Series, Vol. 371, p. 1718.

⁶ A. B. Keith, *loc. cit.*

⁷ *Manchester Guardian Weekly*, Oct. 4, 1940, p. 236; Jan. 24, 1941, p. 61.

⁸ *Dublin Evening Mail*, April 30, 1940. Twenty-one months later, when the Irish Republican Army was accused in the Dail, on Jan. 28, 1942, of collaborating with German agents dropped in Éire by parachute, Mr. de Valera said that if proof could be obtained the charge would be one of high treason. *Manchester Guardian Weekly*, Jan. 30, 1942, p. 68.

⁹ *Manchester Guardian Weekly*, Jan. 10, 1941, p. 25.

¹⁰ *Ibid.*, June 27, 1941, p. 450.

¹¹ *Ibid.*, Nov. 15, 1940, p. 349; Nov. 22, 1940, p. 375. See, in this connection, the *Toronto Daily Star*, Nov. 20, 1940, at p. 19.

In May of 1941, Mr. Brennan, Minister from Éire at Washington, said with reference to discussions concerning the purchase by his country of food ships in the United States, that American officials had not raised in this connection the question of the possible British use of naval bases in Southern Ireland.¹²

Soon after the United States became a belligerent, a new situation developed. The landing of the first American expeditionary forces in Northern Ireland occurred in January of 1942. Mr. de Valera was reported as saying, on the day after this event, that "no matter what troops occupy the Six Counties the Irish people's claim for the union of the national territory and for supreme jurisdiction over it will remain unabated. The maintenance of the partition of Ireland is as indefensible as aggression against all nations which it is the avowed purpose of Great Britain and of the United States in this war to bring to an end." In Belfast, Prime Minister Andrews announced that Northern Ireland would stand on "the constitutional position as it exists," that American troops were "doubly welcomed" in the territory, and that the people of Northern Ireland were proud to be associated with them in the war.¹³ The absence of complete unity in Southern Ireland on the matter is suggested by the course of James Dillon, Deputy Leader of William Cosgrave's Opposition Party. He had earlier opposed the neutrality policy, although without the support of his party leader.¹⁴ On February 10 Mr. Dillon, in a speech at an annual convention of the Fine Gael, sought to show the common cause which Ireland has with the United States. This led to the acceptance of his resignation as Deputy Opposition Leader, the party being committed to the neutrality policy.¹⁵

"Anxious and grave, but not hostile," were the terms in which the attitude of the Dublin government toward the presence of United States troops in Ulster was described in a broadcast.¹⁶ It is hardly possible to evaluate this attitude in terms of law merely. It would seem to be elemental that one state has the right to send its troops to the territory of another with which it is allied or associated in a war. With disputed legal claims to jurisdiction over territory within the British Commonwealth of Nations the United States is unlikely to concern itself, unless such matters should seriously interfere with the winning of the war.¹⁷ At the same time, as a matter of

¹² *Manchester Guardian Weekly*, May 23, 1941, p. 370.

¹³ *Ibid.*, Jan. 30, 1942, p. 68.

¹⁴ *Ibid.*, July 25, 1941, p. 49.

¹⁵ *The Times* (London), Feb. 11, 1942, p. 2; *New York Times*, Feb. 20, 1942, p. 5.

¹⁶ W. T. Arms in *New York Times*, Feb. 8, 1942, IX, p. 12 (reporting a relay by the B.B.C. from Dublin).

¹⁷ An English observer has tried to draw an analogy between the situation as to Ireland and that in India, in the sense that the form of freedom or self-government in one section of the latter country might be quite unacceptable to other sections. Norman Angell, in *New York Times*, March 1, 1942, E, 6.

general policy rather than mere application of law, the American people must be aware of the importance of respecting the aspirations and sensibilities of each group in a collectivity of free peoples, all of whom will ultimately benefit by the democracies' vindication of the very principle of legality in the world.

ROBERT R. WILSON

CURRENT NOTES

NOTICE REGARDING THE ANNUAL MEETING OF THE SOCIETY

After a great deal of work involving much correspondence and many conferences with members of the Executive Council and other members of the Society, the Committee on Annual Meeting has felt obliged to limit the Thirty-Sixth Annual Meeting of the Society to a business meeting in Washington on Saturday morning, April 25, 1942, to be followed by a luncheon at the close of the meeting. This means that no formal program for public discussion will be offered and the usual banquet on Saturday evening will not be held. It is expected that Secretary of State Cordell Hull, the President of the Society, will preside at the session on Saturday morning. After the necessary business is transacted, the members present will have the opportunity to discuss any matters pertinent to the occasion.

The luncheon will be held jointly with the Section of International and Comparative Law of the American Bar Association. There are a number of members who belong to both organizations. Mr. Frederic R. Coudert, of the New York Bar, will preside at the luncheon. The Honorable Francis Biddle, Attorney General of the United States, has accepted an invitation to speak at the luncheon and indicate what the international lawyers might be doing at the present time. Other speakers will be Dr. Philip C. Jessup, of Columbia University, New York City, and Honorable Evan E. Young, for many years in the American diplomatic service with a wide experience.

The Executive Council and the Board of Editors of the JOURNAL will hold their meetings in Washington on the afternoon of the day preceding the meeting of the Society. The Executive Council will also meet on Saturday afternoon following the luncheon.

A number of factors have entered into the decision of the Committee on Annual Meeting to limit the Society's meeting this year to a minimum. Difficulties of transportation under war conditions and crowding of hotel accommodations in Washington were of less importance in reaching the final decision than the increasing gravity of the international situation which has made apparent a public distaste for talk and a demand for action which renders objective discussion practically impossible. The last-mentioned consideration seriously hampered the efforts of the Committee to obtain the desired speakers on subjects which were deemed essential to the success of a public meeting of the Society at this critical period in world affairs.

GEORGE A. FINCH, *Secretary*

"AUSTRO-HUNGARIANS"

International lawyers have been surprised lately to find the expression "Austro-Hungarians" and "Austrian-Hungarians" appearing in several announcements of the Department of Justice since January 26, 1942. They recall that up to 1867 only Austrian citizenship existed. After that date,

when Austria and Hungary formed two separate states linked merely by a common sovereign and in certain matters of foreign representation and war, citizens of the Empire had either Austrian or Hungarian citizenship, never an Austro-Hungarian.¹ International lawyers may also have remembered the amusing error in the annex to Article 203 of the Treaty of St. Germain, where an "Austro-Hungarian Law of December 30, 1907, Imperial Law Collection Number 278" is quoted. Such a law never existed and never could have existed.

Is the use of the expression "Austro-Hungarian" by the Department of Justice a similar mistake? No! If we should examine it precisely, we would find that it speaks only of "persons who *registered* as Austro-Hungarians" under the Alien Registration Act of 1940. Further examination would show that a number of persons—and it seems quite a considerable number—were allowed to use this expression as designation of their nationality. As originally used by the Department of Justice, this designation was only an abbreviated expression referring to people who "immediately prior to the abdication of Emperor Karl were subjects of that sovereign" (in other words, citizens of Austria or of Hungary) "who have acquired no subsequent nationality by any individual act of theirs," and who also *registered* as Austro-Hungarians or Austrian-Hungarians.

Of course the Treaty of St. Germain tried to assure every "former subject of Emperor Karl" of citizenship in the new states of Austria or Hungary, or in one of the other successor states. However, these endeavors were so hindered by various laws and decrees and some illegal practices of the authorities of different states that 15 years later there were in Europe amongst the 100,000 persons without any recognized nationality more than half of the "former subjects of Emperor Karl." The League of Nations dealt extensively and repeatedly with the terrible legal and economic results of their uncertain status, but without much practical result.²

The interpretation of the Department of Justice, which allowed "former subjects of Emperor Karl" to register as Austro-Hungarians covered, also, those who were living outside the territory of the Austro-Hungarian Empire at the moment of his abdication and refused to adopt the citizenship of any of the successor states. This is strong corroboration of the theory that citizens living abroad do not acquire the citizenship of another state which occupies their homeland without an "individual act of theirs."³ The theory is sustained even in the case of an agreement by treaty between the states concerned. It emphasizes the importance of individual declarations,

¹ The natives of Bosnia and Herzegovina after the occupation by Austria-Hungary in 1878 could be called denizens, and after the annexation in 1908 citizens of that state, but have all now acquired Yugoslav nationality.

² Especially in the Report of the Nansen Committee for the year ended June 30, 1935.

³ See authorities quoted in Hofmannsthal-Berger, *Juridical Position of Citizens of Occupied Countries*, note 10.

and shows also the error in the attitude of the authorities of various countries who compelled Austrians to register as Germans, "because Austria no longer exists"—even those Austrians who were not on Austrian soil at the moment of the occupation. The attitude of the Department of Justice thus makes a valuable contribution to the development of international law.

E. VON HOFMANNSTHAL

INTERNATIONAL LAW CONCERNING ACCIDENTS TO WAR PRISONERS EMPLOYED
IN PRIVATE ENTERPRISES

In the course of the 19th century, the unhappy fate of wounded and sick combatants finally succeeded in arousing public opinion. Thanks to the unselfish initiative of two citizens of Switzerland, Gustave Moynier and Henri Dunant, who had lived through the battles of Magenta and Solferino, the Geneva Convention creating the International Red Cross was signed on August 22, 1864.¹ *Inter Arma Caritas*. The idea of humanizing the conduct of war was also a factor in the drafting of the International Convention of St. Petersburg of November 29, 1868, forbidding the use of certain types of projectiles in time of war.² These were, however, only first steps in the establishment of universal laws and rules of warfare, and the publication of the exchange of letters between Field Marshal von Moltke and the famous internationalist Bluntschli—letters which subsequently achieved world-wide fame—proved clearly that the military did not hold with the movement of the times towards the formulation of the international law of warfare. Therefore it was not until convocation of the Conferences of The Hague of 1899 and 1907 that further progress was realized, namely, the conventions on "The laws and customs of war on land."

Among the many questions raised at the Hague Conference of 1907, one of the most important on which agreement seemed possible was that of the treatment of prisoners of war. Indeed, all belligerents have an equal interest in easing the fate of men who cannot return to the front but who, once peace is signed, can again become useful citizens of their countries. The dominant principle of the Hague Convention Concerning Prisoners of War³ is that the detaining Power assumes responsibility for their humane treatment and respect for their persons and honor. The convention also stipulates that, although enemies, prisoners of war retain their civil rights. According to the terms of Articles VI and XVII of the Hague Convention, the detaining Power may employ as laborers prisoners of war other than officers, according to their rank and ability. The daily hours of work should not be excessive and the work shall have no direct connection with the opera-

¹ Geneva Convention concerning the Condition of the Sick and Wounded of Armies in the Field. See this JOURNAL, Supp., Vol. 1 (1907), p. 92.

² See Martens, *Nouveau Recueil Général des Traités*, Vol. XVIII, p. 612; this JOURNAL, Supp., *ibid.*, p. 95.

³ See J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, New York, 1918.

tions of the war. Prisoners may be authorized to work for the government, for private persons or for their own gain. Work executed for the military authorities is to be paid for according to the schedules in force for the soldiers of the national army performing the same labor or, if there is no such schedule, then at rates commensurate with the work performed. When the work is performed for the benefit of other public departments or for private enterprises, the conditions of labor are to be regulated in agreement with the military authorities. Wages earned by prisoners shall be utilized to mitigate their situation, the surplus being credited to them upon their repatriation after deducting the cost of maintenance.

After the outbreak of hostilities in 1914 the "competent French and German services" sought to utilize manual labor furnished by prisoners and ordered their classification according to occupation. Thus, in France, German prisoners were employed in various enterprises of a public character: (1) in unloading of freighters in ports; (2) factory work directly or exclusively for the Ministry of War; (3) farming: threshing and tilling; (4) work in industries supplying the country as a whole: mines, lumber; (5) public works: roadbuilding, railroads; (6) works of a public character constructed by private persons.

It is true that the Hague Convention assured a wage to prisoners but, owing to the fact that at the time of its drafting social legislation was in its infancy, it contained serious flaws. Thus there was no provision for the liability of the employer in case of industrial accidents nor was there any provision for compensation of prisoners thus injured. But despite its deficiencies, the existence of the Hague Convention made it possible to bring up this question among the belligerents during the War of 1914-1918. Negotiations between the French and German Governments culminated in the agreement of 1915,⁴ whereby the two governments agreed to record the accidents which might occur to French and German prisoners during their internment. In compliance with this agreement the following instructions were issued by the Ministry of War, Ministry of Labor and Ministry of Social Security in France:⁵

In case of accidents at work investigation must immediately follow.

In mines the report is to be submitted jointly by the mine engineer, the social security representatives in the mines, and the local authorities.

In other instances the local authorities are to open the necessary inquiries in accordance with Article 12 of the Law of April 9, 1898, concerning Industrial Accidents.

The practical importance of this decree is obvious for, on the one hand, according to the legislation then in force, prisoners of war could not avail

⁴ *Révue de Droit International Privé*, 1915/16, p. 698. See the Circular of the Minister of War, dated July 30, 1916.

⁵ *Révue de Droit International Privé*, *ibid.*, p. 697. See the Circular of the Minister of Justice to the District Attorneys of France, dated Sept. 30, 1916, *Bulletin de l'Office de l'Information* No. 103, pp. 1712/3.

themselves of the Law of April 9, 1898; on the other hand, according to Article 8 of the rules under which public works were generally constructed, the employer did not assume liability except in the case of gross negligence. Even without deciding on the principle of liability on the part of the detaining Power, this agreement enabled prisoners to establish official evidence of an accident arising during their detention for the purpose of later claiming an allowance or pension to which they might be entitled under their own national legislation.

Following this agreement of 1915, the French Government decided that French prisoners, victims of industrial accidents during their captivity, would be considered as having the status of wounded combatants and would be entitled on their return to benefit under provisions relative to army pensions for wounded soldiers. In Germany a similar law was enacted in 1917 which also assured German prisoners, victims of accidents during their internment, of the right to compensation.⁶ It is clear that this legislation was only a beginning in an attempt to protect prisoners. Switzerland again deserves credit for having solved the problem in a more satisfactory manner. As is well known, the Swiss Government interned considerable numbers of belligerent soldiers during the World War and found it necessary to organize work for them. We see from the instructions dated March 3, 1918, issued by Surgeon General Hauscr, that the provisions of the Federal Law concerning the liability of manufacturers were applicable to the internees inasmuch as the establishments which employed them were themselves liable. The internees, victims of accidents, who were employed in enterprises not subject to Federal legislation concerning liability were to be considered and to be treated as soldiers wounded in action.^{6a}

This was the situation at the end of the World War. After the Peace Conference the complaints which were raised during the war continued to occupy public attention, and in 1929, upon the invitation of Switzerland, representatives of 47 nations met in Geneva to draft a new code relative to the treatment of prisoners of war. This convention, signed July 27, 1929, entered into force June 19, 1931.⁷ It recognized the right of the detaining Power to utilize as workers prisoners of war other than officers and persons of equivalent status. On the other hand, prisoners of war were entitled to benefit under the Workmen's Compensation Laws of the detaining Power.⁸ As regards prisoners of war to whom this legislation could not be applied by reason of the lack of uniformity of social legislation in the various countries which signed the Geneva Convention, such countries undertook to recom-

⁶ Law of Aug. 15, 1917 (*Gesetz über Fürsorge für Kriegsgefangene*), *Reichsgesetzblatt*, 1917, p. 725.

^{6a} *Almanach des internés Français*, Berne, 1919, pp. 125-6.

⁷ *Actes de la Conférence diplomatique de Genève*, Geneva, 1930, p. 681; Hudson, *International Legislation*, Vol. V, p. 20, Washington, 1936.

⁸ Art. 27 *ibid.*

ment to their legislature all proper measures for the equitable compensation of the victims.⁹ In addition, the detaining Power assumes responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for private enterprises. Hours of work should not be excessive and should not exceed those established for civilians in the same localities employed on the same work.¹⁰

In compliance with the Geneva Convention of 1929, the German Government published the following communiqué in September, 1940, on behalf of 1,500,000 French prisoners:

Prisoners of war interned in German camps are employed in conformity with international law as adopted by the Convention of July 27, 1929, Concerning the Treatment of Prisoners of War. According to this Convention, prisoners of war, with the exception of officers and in certain cases noncommissioned officers, may be employed for certain work. These occupations, however, must not be connected in any way with war operations. Therefore, it is not required of prisoners of war in Germany to work in the transportation of arms, munitions or matériel destined for the armed forces.

Conditions of work for prisoners of war have been drawn up by the High Command of the German Army in accord with the Ministry of Labor. Allotment of prisoners of war is delegated to the Ministry of Labor and this Ministry establishes rules for the work to be done. The welfare services of the Ministry must examine the prisoners to determine whether they are able to execute the work assigned to them. Naturally any employer who wishes to employ prisoners must pay for the labor according to rates determined by the Ministry of Labor. In case of accidents occurring at work, prisoners of war are entitled to compensation under the German Workmen's Compensation Act.¹¹

In accordance with the Geneva Convention of 1929, signed and ratified by Australia, Belgium, Brazil, Canada, Chile, Denmark, Egypt, France, Germany, Great Britain, Greece, India, Iraq, Italy, Latvia, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Rumania, South Africa, Spain, Sweden, Switzerland, Turkey, the United States and Yugoslavia, in case of industrial accidents, liability is assumed directly by the detaining Power. Of the great Powers now at war, Russia, China and Japan did not adhere to the Geneva Convention, but they are, however, still bound by the Hague Convention of July 29, 1899, and October 18, 1907, to which they are signatories.¹²

Since the outbreak of war with Japan in the Pacific, the State Department has notified the Tokyo Government through the good offices of Switzerland that the United States will adhere to the provisions of the Geneva Conven-

⁹ See the statements of the Swiss delegate, Colonel de la Harpe, *Actes diplomatiques de la Conférence de Genève*, 1930, p. 478.

¹⁰ Arts. 28-30, *ibid.*

¹¹ See *La Petite Girondine*, Oct. 7, 1940; *Neus Züricher Zeitung*, May 28, 1941.

¹² China adhered to the Convention of July 29, 1899, on June 12, 1907; Russia, on Nov. 27, 1909; and Japan on Dec. 13, 1911, ratified the Convention of Oct. 18, 1907.

tion Concerning the Treatment of Prisoners of War and hopes that Japan will reciprocate.¹³ In addition, the State Department declared itself willing to apply the Geneva Convention of 1929 not only to prisoners of war but, as far as possible, to civilian enemy aliens interned in the United States, although the convention does not refer to civilians.

CURT H. ROSENBERG

¹³ See letter addressed by the State Department to Dr. Darius Davis, *New York Times*, Dec. 27, 1941.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 15, 1941-FEBRUARY 15, 1942

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Chunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

September 3, 1939—January 31, 1942

WAR DECLARATIONS. List covering the period from Sept. 3, 1939, was issued by the Department of State. *D. S. B.*, Dec. 20, 1941, pp. 551-561. Action taken by American Republics: *D. S. B.*, Dec. 13, 20, 27, 1941, pp. 485-504, 545-551, 583-584; Jan. 31, Feb. 7, 1942, pp. 89-91, 143-145.

September, 1941

15-24 PAN AMERICAN HIGHWAY CONGRESS. Convened at Mexico City, concurrently with the second Inter-American Travel Congress. *N. Y. Times*, Sept. 16, 1941, p. 12. Delegates: *D. S. B.*, Sept. 6, 1941, p. 183.

30 HAITI—UNITED STATES. Signed supplementary financial agreement at Port-au-Prince. French and English texts: *Ex. Agr. Ser.* No. 224.

November, 1941

4/December 3 BULGARIA—UNITED STATES—YUGOSLAVIA. Texts of notes from Yugoslav Minister at Washington to the Secretary of State, protesting Bulgarian dismemberment of Yugoslavia, and Mr. Welles' reply: *D. S. B.*, Dec. 13, 1941, pp. 510-511.

15-27 INTELLECTUAL COÖPERATION. The American Conference of National Committees on Intellectual Coöperation met at Havana with all American Republics represented except Paraguay. *N. Y. Times*, Nov. 16, 1941, p. 5. Approved resolution for assistance to war prisoners and refugees. *N. Y. Times*, Nov. 19, 1941, p. 7. Adopted resolution for the establishment of an intellectual institute in some American country for the duration of the war. Recommended the obligatory teaching of the Spanish, English, French and Portuguese languages in schools. *N. Y. Times*, Nov. 20, 1941, p. 12. 25 of the group present signed a declaration on Nov. 25 for the protection of democracy. *N. Y. Times*, Nov. 26, 1941, p. 10.

17-December 8 JAPAN—UNITED STATES. Conferences opened Nov. 17 between Secretary Hull and the Japanese special envoy Kurusu. *N. Y. Times*, Nov. 18, 1941, p. 1. On Nov. 26 Mr. Hull handed a document to Mr. Kurusu reiterating United States refusal to recognize Japanese conquests in China. *N. Y. Times*, Nov. 27, 1941, p. 1. President Roosevelt sent message to Emperor of Japan on Dec. 6 to which the Japanese Government replied Dec. 7. Texts: *D. S. B.*, Dec. 13, 1941, pp. 461-470; *N. Y. Times*, Dec. 6 and 8, 1941, pp. 1 and 3, and 10. Japan declared war Dec. 7. *N. Y. Times*, Dec. 8, 1941, p. 1. The United States declared war Dec. 8. Text: *Cong. Record* (daily), Dec. 8, 1941, p. 9750; *D. S. B.*, Dec. 13, 1941, p. 475. See also this JOURNAL, Supp., Vol. 36 (Jan. 1942), pp. 22-55.

- 18 FINLAND—SOVIET RUSSIA. A Russian communiqué denied the Finnish claim of being at war with Russia in self-defense. Excerpts: *N. Y. Times*, Nov. 19, 1941, p. 4.
- 18 FRANCE (Vichy)—IRAQ. Diplomatic relations severed by Iraq. *London Times*, Nov. 19, 1941, p. 3; *B. I. N.*, Nov. 29, 1941, p. 1937.
- 18 GERMANY—UNITED STATES. The cruiser *Omaha* was disclosed as the captor of the German freighter *Odenwald*, disguised as the *Willmote* of Philadelphia, and taken into custody on Nov. 6. A libel suit was entered against the ship's cargo and freight on behalf of the crew of the *Omaha*. *N. Y. Times*, Nov. 19, 1941, p. 3. See this JOURNAL, Vol. 36 (Jan. 1942), p. 96.
- 18 IRAQ—JAPAN. Diplomatic relations severed by Iraq. *N. Y. Times*, Nov. 19, 1941, p. 10.
- 19-February 10, 1942 MEXICO—UNITED STATES. Signed agreements at Washington on Nov. 19 and Dec. 19 concerning expropriation of oil properties; claims, stabilization of the peso and dollar; purchase of Mexican silver, etc. Texts: *Cong. Record* (daily), Jan. 29, 1942, pp. 860-861; *D. S. B.*, Nov. 21, 1941, pp. 401-403. President Avila Camacho signed decrees on Jan. 7 approving the agreements regarding claims and expropriation of oil properties. The claims agreement was ratified Feb. 10 by President Roosevelt. *D. S. B.*, Feb. 14 and 21, 1942, pp. 159 and 178.
- 20 FRANCE (Vichy)—UNITED STATES. Secretary Hull announced that "American policy toward France is being reviewed, and all plans for economic assistance to French North Africa are suspended." *D. S. B.*, Nov. 22, 1941, p. 407; *N. Y. Times*, Nov. 21, 1941, p. 1.
- 21 ARGENTINA—BRAZIL. Signed treaty at Buenos Aires granting reciprocal free entry to goods produced by new industries. *N. Y. Times*, Nov. 22, 1941, p. 10. Text of treaty and protocol: *Argentine News* (Buenos Aires), Dec. 1, 1941, pp. 2-4.
- 21 COLOMBIA—URUGUAY. Signed convention of conciliation and arbitration at Montevideo. *D. S. B.*, Dec. 13, 1941, p. 523.
- 21 ICELAND—UNITED STATES. Signed lend-lease agreement at Washington. *N. Y. Times*, Nov. 22, 1941, p. 1.
- 23 INTER-AMERICAN JEWISH CONFERENCE. First conference convened at Baltimore with delegates from 18 Central and South American countries and Canada. Sumner Welles pledged aid of the United States to refugees. *N. Y. Times*, Nov. 24, 1941, p. 5.
- 24 FRANCE (Free)—UNITED STATES. Free French headquarters in New York announced extension of lend-lease aid from the United States. *N. Y. Times*, Nov. 25, 1941, p. 1.
- 24 NETHERLANDS (in exile)—UNITED STATES. The United States announced that, by arrangement with the Government of The Netherlands, the United States would send troops to protect the bauxite mines in Surinam (Dutch Guiana). *D. S. B.* Nov. 29, 1941, p. 425; *N. Y. Times*, Nov. 25, 1941, p. 1; *London Times*, Nov. 25, 1941, p. 4.
- 25 ANTI-COMMUNIST PACT. Representatives of ten nations at Berlin signed protocol to the pact of Nov. 25, 1936, providing (1) for 5-year renewal of the pact by the original signers, (2) that countries invited to join should notify Germany of their intentions, and (3) that signers should notify each other in due time, prior to the expiration date concerning the further character of their cooperation. Text of protocol: *N. Y. Times*, Nov. 26, 1941, p. 12. The Nanking Government of China

telegraphed its adherence. *B. I. N.*, Dec. 13, 1941, p. 1978. List of countries represented: *London Times*, Nov. 26, 1941, p. 3.

- 26 LEBANON. In the name of Free France, Gen. Catroux at Beirut read a charter declaring the Lebanon to be an independent sovereign state. *London Times*, Nov. 28, 1941, p. 3. President Naccash promised loyal Lebanese collaboration with the Allies. *B. I. N.*, Dec. 13, 1941, p. 1993.
- 26 PLATE RIVER COUNTRIES. Argentina, Brazil, Paraguay, Uruguay, together with Bolivia and Chile, agreed on uniform immigration requirements. *N. Y. Times*, Nov. 27, 1941, p. 8.
- 27 CANADA—UNITED STATES. President Roosevelt approved the agreement, reached by exchange of notes of Oct. 24 and 27 last, regarding diversion of additional waters of the Niagara River for power purposes. Texts of notes: *Cong. Record* (daily), Nov. 27, 1941, pp. 9427-9428; *Canada Treaty Ser.* 1941, No. 15; *Ex. Agr. Ser.* No. 223.
- 29 FINLAND—SOVIET RUSSIA. Finnish Parliament passed a bill re-incorporating territory within Finland's former borders and acquired in the current war with Soviet Russia. *N. Y. Times*, Nov. 30, 1941, p. 35.
- 29 ITALY—UNITED STATES. Italian decree required United States nationals to declare property owned in Italy, or from which an income is derived. *N. Y. Times*, Nov. 30, 1941, p. 24.

December, 1941

- 2 DENMARK—GREAT BRITAIN. Danish Minister in London announced he had broken off relations with his own government because of Denmark's adherence to the Anti-Comintern pact, but would maintain "a free Denmark's diplomatic relations with Great Britain." *N. Y. Times*, Dec. 3, 1941, p. 8.
- 3 TURKEY—UNITED STATES. President Roosevelt ordered lease-lend aid to Turkey. *N. Y. Times*, Dec. 4, 1941, p. 1.
- 3-February 7, 1942 BLACKLIST. Supplements Nos. 4-7 and Revision I were issued by Secretary of State Hull. *D. S. B.*, Dec. 6, 13, 27, 1941, pp. 452, 520-521, 590; Jan. 17, Feb. 14, 1942, pp. 67, 154.
- 4 GREAT BRITAIN—TRANSJORDANIA. Agreement, supplementary to the 1928 agreement, was published as a White Paper. It provides for maintenance in Transjordan of British armed forces, etc. *B. I. N.*, Dec. 13, 1941, p. 1984.
- 4 POLAND (in exile)—SOVIET RUSSIA. Signed a declaration of friendship and mutual aid. Text: *N. Y. Times*, Dec. 6, 1941, p. 7.
- 6 BOLIVIA—UNITED STATES. Signed lease-lend agreement at Washington. *N. Y. Times*, Dec. 7, 1941, p. 47; *B. I. N.*, Dec. 13, 1941, p. 1996.
- 6 ECUADOR. Ecuador announced cancellation of commercial treaties with Germany, Italy, Belgium, The Netherlands and France. *N. Y. Times*, Dec. 7, 1941, p. 7.
- 6 FINLAND—GREAT BRITAIN. The Finnish Foreign Office made public a note which stated the war is being waged solely for safeguarding Finland. Text: *N. Y. Times*, Dec. 8, 1941, p. 20.
- 6 FINLAND—UNITED STATES. Finnish ships in United States ports were seized. *N. Y. Times*, Dec. 7, 1941, p. 1.

- 6 INTER-AMERICAN FINANCIAL & ECONOMIC ADVISORY COMMITTEE. Announced organization of a commission on maritime affairs to advise on allotting refugee merchant ships for use on inter-American routes. *N. Y. Times*, Dec. 7, 1941, p. 33. Personnel from 7 countries: *P. A. U.*, March, 1942, p. 167.
- 7 FINLAND—NORWAY. The Norwegian Government in London broke off diplomatic relations with Finland. *B. I. N.*, Dec. 13, 1941, p. 1991.
- 7-13 CREDITS, FREEZING OF. On Dec. 7 United States froze Japanese credits. *N. Y. Times*, Dec. 8, 1941, p. 7. On Dec. 9 Brazil, Peru and Uruguay froze Japanese credits. *N. Y. Times*, Dec. 9, 1941, p. 13. Thai credits were frozen by the United States on Dec. 9. *N. Y. Times*, Dec. 10, 1941, p. 6. Uruguay and Venezuela froze Axis funds Dec. 10. *N. Y. Times*, Dec. 13, 1941, p. 7. Colombia and Bolivia froze Axis funds Dec. 11. *N. Y. Times*, Dec. 12, 1941, p. 9. Panama froze Axis credits Dec. 13. *N. Y. Times*, Dec. 14, 1941, p. 55.
- 7-29 SOLIDARITY OF THE AMERICAN REPUBLICS. Action taken by the various republics: *D. S. B.*, Dec. 13 and 20, 1941, pp. 485-504, 545-551.
- 7/8/January 14, 1942 ALIEN ENEMIES. On Dec. 7 and 8 President Roosevelt signed proclamations Nos. 2525, 2526 and 2527, designating enemy aliens. *D. S. B.*, Dec. 13, 1941, p. 520. Texts: *Federal Register*, Dec. 10, 1941, pp. 6321, 6323, 6324. Proclamation No. 2537 was signed Jan. 14. *D. S. B.*, Jan. 17, 1942, pp. 66-67.
- 8 COLOMBIA—JAPAN. Diplomatic relations severed by Colombia. *D. S. B.*, Dec. 13, 1941, pp. 489-490.
- 8 EGYPT—JAPAN. Relations severed by Egypt. *N. Y. Times*, Dec. 9, 1941, p. 18.
- 8 JAPAN—MEXICO. Diplomatic relations severed by Mexico. *D. S. B.*, Dec. 20, 1941, p. 551.
- 8 JAPAN—POLAND (in exile). Relations broken off by Poland. *N. Y. Times*, Dec. 9, 1941, p. 18.
- 9 ARGENTINA—UNITED STATES. Argentina granted use of its port facilities to the United States. *N. Y. Times*, Dec. 9, 1941, p. 22.
- 9-11 WORLD WAR. Rulers of various anti-Axis countries exchanged pledges of aid. Texts: *N. Y. Times*, Dec. 13, 1941, p. 6; *D. S. B.*, Dec. 13, 1941, pp. 507-510, 511-512.
- 10 EGYPT—HUNGARY. Diplomatic relations broken off by Egypt. *N. Y. Times*, Dec. 16, 1941, p. 16.
- 10 EGYPT—RUMANIA. Diplomatic relations broken off by Egypt. *N. Y. Times*, Dec. 16, 1941, p. 16.
- 10 FRENCH INDO-CHINA—JAPAN. The Vichy Government announced conclusion of a treaty regarding Indo-Chinese defense. *N. Y. Times*, Dec. 11, 1941, p. 7.
- 10 JAPAN—THAILAND. State of war proclaimed by Thailand on Dec. 11, as of Dec. 10. *B. I. N.*, Dec. 27, 1941, p. 2036.
- 11 AXIS POWERS (2)—JAPAN. Signed four-part joint declaration agreeing that each country would make no separate peace. Text of declaration: *N. Y. Times*, Dec. 12, 1941, p. 4.
- 11 AXIS POWERS (3)—MEXICO. Diplomatic relations severed by Mexico. *N. Y. Times*, Dec. 12, 1941, p. 9; *D. S. B.*, Jan. 31, 1942, p. 91.

- 11 GERMANY—UNITED STATES. Text of German declaration of war: *N. Y. Times*, Dec. 12, 1941, p. 5; *D. S. B.*, Dec. 13, 1941, pp. 481-482. Text of S. J. Res. 119 declaring war on Germany: *Cong. Record* (daily) Dec. 11, 1941, p. 9904. Text of President Roosevelt's proclamation of a state of war: *Cong. Record*, *ib.*, pp. 10015-10016. See also this JOURNAL, Supp., Vol. 36 (Jan. 1942), pp. 1-3.
- 11 ITALY—MEXICO. Diplomatic relations severed by Mexico. *N. Y. Times*, Dec. 12, 1941, p. 9; *D. S. B.*, Dec. 20, 1941, p. 550.
- 11 ITALY—UNITED STATES. Italy declared war. *N. Y. Times*, Dec. 12, 1941, p. 1. Text of Mussolini's statement: p. 4. Text of S. J. Res. 120 declaring war on Italy: *Cong. Record* (daily), Dec. 11, 1941, p. 9905; Public 332 (77th Cong.); *D. S. B.*, Dec. 13, 1941, p. 476. See also this JOURNAL, Supp., Vol. 36 (Jan. 1942), pp. 2-3.
- 11/13 HUNGARY—UNITED STATES. Diplomatic relations severed by Hungary on Dec. 11. *N. Y. Times*, Dec. 12, 1941, p. 5. War was declared Dec. 13 by Hungary. *D. S. B.*, Dec. 13, 1941, p. 482.
- 12 RUMANIA—UNITED STATES. Text of Rumanian declaration of war: *D. S. B.*, Dec. 13, 1941, p. 483.
- 12/16 FRANCE (Vichy)—UNITED STATES. 14 French ships in United States ports were seized Dec. 12 by the United States. *N. Y. Times*, Dec. 13, 1941, p. 1; *D. S. B.*, Dec. 13, 1941, p. 518. The State Department announced Dec. 16 the United States will take over the *Normandie* for which compensation will be made later. *D. S. B.*, Dec. 20, 1941, p. 544.
- 13 BRAZIL—UNITED STATES. Brazilian ports opened to the United States. *N. Y. Times*, Dec. 14, 1941, p. 55.
- 13 MAGELLAN STRAIT. Lighthouses on and near the coast are being closed and navigation forbidden after dark. Chilean pilots will navigate ships between the Atlantic and Pacific Oceans. *N. Y. Times*, Dec. 14, 1941, p. 55.
- 13 SWEDEN—UNITED STATES. *S.S. Kungsholm* of the Swedish-American Line was taken over by the United States Government. *N. Y. Times*, Dec. 14, 1941, pp. 1, 43; *D. S. B.*, Dec. 13, 1941, p. 519.
- 13 VENEZUELAN PORTS. Opened to ships of United States and other American nations at war with the Axis Powers. *N. Y. Times*, Dec. 14, 1941, p. 55.
- 13-14 NEUTRALITY DECLARATIONS. France (Vichy), Turkey and Ireland announced their neutrality. *N. Y. Times*, Dec. 14 and 15, 1941, pp. 9 and 3; *D. S. B.*, Dec. 13 and 20, 1941, pp. 507, 544.
- 14 RUMANIA—TURKEY. Signed a trade pact at Ankara. *N. Y. Times*, Dec. 15, 1941, p. 8.
- 15 COSTA RICA—FRANCE (Vichy). Costa Rica recalled its Minister to Vichy. *N. Y. Times*, Dec. 16, 1941, p. 9.
- 15 JAPAN—UNITED STATES. President Roosevelt sent message to Congress reviewing Japanese-American relations. Text with annexes: *H. Doc.* 458 (77th Cong., 1st Sess.); this JOURNAL, Vol. 36 (Jan. and April, 1942), pp. 24-55, 95-150. Text, with items 10, 11 and 13 of the annexes to the message: *D. S. B.*, Dec. 20, 1941, p. 529-541. Text of message without annexes: *N. Y. Times*, Dec. 16, 1941, p. 6.
- 16 INTERNATIONAL INSTITUTE OF AGRICULTURE. Permanent Commission of the Institute opened its winter session at Rome, with representatives from 24 countries, among whom were two new members, Croatia and Slovakia. *N. Y. Times*, Dec. 17, 1941, p. 3.

- 16 SPAIN—UNITED STATES. United States agents took possession of the Spanish liner *Isla de Tenerife*, for alleged violation of the Trading with the Enemy Act. *N. Y. Times*, Dec. 17, 1941, p. 18.
- 18 MARTINIQUE—UNITED STATES. Reached agreement providing that the neutral status of French possessions and naval vessels in the Western Hemisphere shall remain unchanged. *N. Y. Times*, Dec. 19, 1941, p. 1.
- 18 WORLD WAR. Department of State released a chronology, March 1938 to December 1941. *D. S. B.*, Dec. 27, 1941, pp. 590-599.
- 18-January 23, 1942 TIMOR. Announcement made in London of occupation of Portuguese Timor by Dutch and Australian forces. *N. Y. Times*, Dec. 19, 1941, p. 1. Great Britain notified Portugal that military forces will be withdrawn when the menace of Japan has ceased or when Portugal maintains an adequate garrison. *N. Y. Times*, Dec. 21, 1941, p. 15. Extracts from British statement: *N. Y. Times*, Dec. 22, 1941, p. 6. The Portuguese Government issued a statement announcing the despatch of troops for the defense of the island. *London Times*, Jan. 24, 1942, p. 3.
- 19 AXIS POWERS (2)—COLOMBIA. Diplomatic relations broken off by Colombia. *N. Y. Times*, Dec. 20, 1941, p. 8; *D. S. B.*, Dec. 20, 1941, p. 547.
- 19 GERMANY—SWEDEN. Signed trade agreement for 1942. *N. Y. Times*, Dec. 20, 1941, p. 8.
- 21 JAPAN—THAILAND. Signed 10-year treaty of alliance at Bangkok. *B. I. N.*, Dec. 27, 1941, p. 2041.
- 22/26 CHURCHILL, WINSTON. Arrived in Washington Dec. 22 to confer with President Roosevelt. Text of White House statement: *N. Y. Times*, Dec. 22, 1941, p. 1. On Dec. 26 Mr. Churchill addressed a joint session of Congress. Text of address: *Cong. Record* (daily), Dec. 26, 1941, pp. 10386-10388; *N. Y. Times*, Dec. 27, 1941, p. 4.
- 23 BULGARIA—MEXICO. Diplomatic relations broken off by Mexico. *N. Y. Times*, Dec. 24, 1941, p. 8.
- 23 CUBA—UNITED STATES. Signed supplementary trade agreement at Havana. *N. Y. Times*, Dec. 24, 1941, p. 27. Analysis: *D. S. B.*, Dec. 27, 1941, pp. 602-612.
- 23 HUNGARY—MEXICO. Diplomatic relations severed by Mexico. *N. Y. Times*, Dec. 24, 1941, p. 8.
- 24 MEXICO—UNITED STATES. The Mexican Government authorized the United States to use Mexican territory, waters and ports. *N. Y. Times*, Dec. 25, 1941, p. 9.
- 24 THAILAND. Thai envoy at Washington announced he would carry on his work as Minister, looking to the independence and liberty of his country. *N. Y. Times*, Dec. 25, 1941, p. 9.
- 25-February 13, 1942 FRANCE (Free)—UNITED STATES. Free French forces seized the islands of St. Pierre and Miquelon, off Newfoundland, a move not approved by the United States Government, which asked the Canadian Government what steps it was prepared to take to restore the *status quo*. *N. Y. Times*, Dec. 26, 1941, pp. 1, 9; *London Times*, Dec. 27, 1941, p. 3. A plebiscite showed 98% in favor of alliance with the Free French. *N. Y. Times*, Dec. 29, 1941, p. 5; *London Times*, Dec. 29, 1941, p. 3. Under Secretary of State Welles told a press conference the *coup* did not violate the Act of Havana. *N. Y. Times*, Feb. 14, 1942, p. 1.

- 26 OPEN CITY (Manila). General MacArthur proclaimed Manila an open city after the evacuation of military and governmental activities. *N. Y. Times*, Dec. 27, 1941, p. 1.
- 27 HUNGARY. Free Hungarians, meeting in London, pledged themselves to the Allied cause. *B. I. N.*, Jan. 10, 1942, p. 32.
- 28/January 28, 1942 NEW ZEALAND—UNITED STATES. Walter Nash appointed Minister in Washington. *N. Y. Times*, Dec. 29, 1941, p. 4; *B. I. N.*, Jan. 10, 1942, p. 35. Patrick J. Hurley named first United States Minister to New Zealand. *N. Y. Times*, Jan. 29, 1942, p. 6.
- 31 AXIS POWERS (3)—VENEZUELA. Diplomatic relations severed by Venezuela. *D. S. B.*, Jan. 3, 1942, p. 6; *London Times*, Jan. 2, 1942, p. 3; *B. I. N.*, Jan. 10, 1942, p. 40.

January, 1942

- 1 GERMANY—POLAND. German authorities introduced a special Penal Code for Jews and Poles for that part of Poland incorporated into the Reich. *London Times*, Jan. 13, 1942, p. 8.
- 1-5 UNITED NATIONS DECLARATION. Joint declaration was signed at Washington by representatives of 26 nations. Text: *D. S. B.*, Jan. 3, 1942, pp. 3-4; *Canada Treaty Ser.* 1942, No. 1; *N. Y. Times*, Jan. 3, 1942, pp. 1, 4; *London Times*, Jan. 3, 1942, p. 4. On Jan. 2 the Danish Minister at Washington adhered to the Declaration in the name of Danes in the free world. *Inter-Allied Review* (New York), Jan. 15, 1942, p. 2. Free French National Committee in London issued statement regarding conditions under which France might adhere. Text of statement: *London Times*, Jan. 6, 1942, p. 3; *N. Y. Times*, Jan. 6, 1942, p. 8. The Chairman of the Free German movement notified Secretary Hull his movement adhered to the Declaration, *N. Y. Times*, Jan. 6, 1942, p. 11. The United States is the depository for possible future adherences. *D. S. B.*, Jan. 10, 1942, p. 44.
- 5 CZECHOSLOVAKIA (in exile)—UNITED STATES. President Roosevelt's letter to the Office of Lend-lease Administrator declared the defense of the Provisional Government of Czechoslovakia is vital to the defense of the United States. *D. S. B.*, Jan. 10, 1942, p. 44.
- 5/26 CREDITS, FREEZING OF. United States froze Philippine credits. *N. Y. Times*, Jan. 6, 1942, p. 3. On Jan. 26 Costa Rica froze Axis funds. *N. Y. Times*, Jan. 27, 1942, p. 14.
- 6 BRAZIL—GERMANY. Brazil seized German-controlled Condor airline. *N. Y. Times*, Jan. 7, 1942, p. 10.
- 6 EGYPT—FRANCE (Vichy). Diplomatic relations suspended by Egypt. *London Times*, Jan. 7, 1942, p. 3.
- 6 POLISH MARITIME COURTS. Opened in Middlesex Guild Hall. *London Times*, Jan. 7, 1942, p. 2.
- 13 WAR CRIMES. Representatives of Poland, Norway, The Netherlands, Belgium, Free France, Yugoslavia, Greece, Czechoslovakia and Luxemburg, meeting in London, signed a resolution to exact retribution from those perpetrating atrocities in occupied countries. Text: *N. Y. Times*, Jan. 14, 1942, p. 6; *Inter-Allied Review* (New York), Jan. 15, 1942, p. 2; *B. I. N.*, Jan. 24, 1942, pp. 50-51.
- 13 UNITED STATES—URUGUAY. Signed lend-lease agreement for military and naval supplies. *N. Y. Times*, Jan. 14, 1942, p. 1.

- 13/30 PRISONERS OF WAR. In compliance with the Geneva Convention of 1929, Japan has agreed to exchange data on American prisoners and interned persons according to an announcement from the American and International Red Cross. *N. Y. Times*, Jan. 31, 1942, p. 3; *London Times*, Jan. 14, 1942, p. 4; *D. S. B.*, Jan. 31, 1942, p. 92.
- 15 GREECE (in exile)—YUGOSLAVIA (in exile). Representatives of the governments in exile signed agreement in London, providing for close political, economic and military coöperation, and outlining a constitution for a future general Balkan union. *N. Y. Times*, Jan. 16, 1942, p. 2. English text: *New Europe* (New York), Feb. 1942, pp. 79-80; *London Times*, Jan. 16, 1942, p. 3.
- 15-28 FOREIGN MINISTERS OF THE AMERICAN REPUBLICS CONSULTATIVE MEETING. Third meeting opened at Rio de Janeiro on Jan. 15. Text of Under Secretary of State Welles' address: *N. Y. Times*, Jan. 16, 1942, p. 4; *D. S. B.*, Jan. 17, 1942, pp. 55-63. On Jan. 22 a recommendation was adopted for severance of diplomatic relations with Axis Powers. *N. Y. Times*, Jan. 23, 1942, pp. 1, 8. Adjourned Jan. 28 with all delegates signing the Final Act. *N. Y. Times*, Jan. 29, 1942, pp. 1, 11. Text of Final Act: *D. S. B.*, Feb. 7, 1942, pp. 117-141; this JOURNAL, Supp., pp. 61-95.
- 18 AXIS POWERS—JAPAN. Signed military convention in Berlin. *B. I. N.*, Jan. 24, 1942, p. 69; *London Times*, Jan. 19, 1942, p. 3.
- 19 RUMANIA—TURKEY. Signed a commercial treaty. *N. Y. Times*, Jan. 20, 1942, p. 7.
- 22 POLAND (in exile)—SPAIN. Spanish Government closed the Polish Legation in Madrid, and asked the Minister to leave the country. *London Times*, Jan. 23, 1942, p. 3.
- 23 CZECHOSLOVAKIA (in exile)—POLAND (in exile). Signed a confederation agreement in London. *N. Y. Times*, Jan. 24, 1942, p. 2. Text: *London Times*, Jan. 24, 1942, p. 3.
- 23 POLAND (in exile)—SOVIET RUSSIA. Signed agreement at Kuibyshev, providing for a loan to Poland of 300 million rubles for the upkeep of the Polish army. *Free Europe* (London), Jan. 30, 1942, p. 45.
- 24 AXIS POWERS (3)—PERU. Diplomatic relations severed by Peru. *N. Y. Times*, Jan. 25, 1942, p. 1; *D. S. B.*, Jan. 31, 1942, p. 89.
- 24 AXIS POWERS (3)—URUGUAY. Diplomatic relations severed by Uruguay. *N. Y. Times*, Jan. 25, 1942, p. 1; *D. S. B.*, Jan. 31, 1942, p. 90.
- 26 AXIS POWERS (3)—BOLIVIA. Diplomatic relations broken off by Bolivia. *N. Y. Times*, Jan. 27, 1942, p. 10; *D. S. B.*, Jan. 31, 1942, p. 90.
- 27 BOLIVIAN OIL. Agreement reached by the Bolivian Government with the Standard Oil Co. of Bolivia and the Standard Oil Co. (N. J.). Text: *D. S. B.*, Feb. 21, 1942, pp. 172-173.
- 27 FRENCH ISLANDS IN THE PACIFIC. Announcement made in Washington that the Free French have agreed to the use of French possessions in the Pacific Ocean by the Allies for military purposes. *N. Y. Times*, Jan. 28, 1942, p. 1.
- 27 GREAT BRITAIN—UNITED STATES. Text of White Paper presented to Parliament, entitled "Coördination of the Allied War Effort". It announces establishment of a Munitions Assignments Board, a Combined Shipping Adjustment Board, and a Combined Raw Materials Board. Text: *London Times*, Jan. 28, 1942, p. 9; *Cmd.* 6332; *D. S. B.*, Jan. 31, 1942, pp. 87-88.

- 27 IRELAND—UNITED STATES. Premier de Valera of Ireland protested arrival of United States armed forces in Northern Ireland. Text of protest: *N. Y. Times*, Jan. 28, 1942, p. 4.
- 27 POLAND (General Government). Poles, living in this administrative area, are to be considered "stateless" according to a decree of the German Governor. *N. Y. Times*, Jan. 28, 1942, p. 8.
- 28 AXIS POWERS (3)—BRAZIL. Diplomatic and commercial relations broken off by Brazil. *N. Y. Times*, Jan. 29, 1942, p. 1; *D. S. B.*, Jan. 31, 1942, p. 89.
- 28 BOLIVIA—UNITED STATES. Signed agreement at Rio de Janeiro for a 25-million dollar development program in Bolivia. *N. Y. Times*, Jan. 29, 1942, p. 11.
- 29 AXIS POWERS (3)—ECUADOR. Diplomatic relations severed by Ecuador. *N. Y. Times*, Jan. 30, 1942, p. 4; *D. S. B.*, Jan. 31, 1942, p. 91.
- 29/Feb. 5 GREAT BRITAIN—IRAN—SOVIET RUSSIA. Iran signed treaty Jan. 29 at Teheran by which Great Britain and Russia undertake to respect the territorial integrity, sovereignty and political independence of Iran, which agrees to try to cooperate freely and to maintain internal order. *N. Y. Times*, Jan. 31, 1942, p. 7. The treaty came into force on Feb. 5. *N. Y. Times*, Feb. 6, 1942, p. 4. Summary: *London Times*, Jan. 31, 1942, p. 3.
- 29/Feb. 13 ECUADOR—PERU. Representatives of Ecuador, Peru, Argentina, Chile, Brazil and the United States, present at the Foreign Ministers' meeting at Rio de Janeiro, signed a protocol settling the Ecuadorean-Peruvian border dispute. Chief terms: *N. Y. Times*, Jan. 30, 1942, p. 4. The border province of El Oro was turned over by Peru to Ecuador in a ceremony at Guayaquil on Feb. 13. *N. Y. Times*, Feb. 14, 1942, p. 7.
- 30 AXIS POWERS (3)—PARAGUAY. Diplomatic relations broken off by Paraguay. *N. Y. Times*, Jan. 31, 1942, p. 6; *D. S. B.*, Jan. 31, 1942, p. 91.

February, 1942

- 1 NORWAY. Vidkun Quisling was proclaimed Regent of Norway by Reich Commissar, Joseph Terboven. *N. Y. Times*, Feb. 2, 1942, p. 5; *London Times*, Feb. 2, 1942, p. 3.
- 2 EL SALVADOR—UNITED STATES. Secretary Hull announced signature of a lend-lease agreement. *N. Y. Times*, Feb. 3, 1942, p. 10.
- 3 ETHIOPIA—GREAT BRITAIN. British Foreign Secretary announced a 2-year agreement, providing for a large grant to Ethiopia, British military advisers and some British magistrates in Ethiopian courts, etc. *N. Y. Times*, Feb. 4, 1942, p. 7. Summary: *London Times*, Feb. 4, 1942, p. 3. Text: *Cmd.* 6334.
- 5 FRANCE (Vichy)—IRAN. Diplomatic relations broken off by Iran. *N. Y. Times*, Feb. 6, 1942, p. 4.
- 6 NON-BELLIGERENCY. Uruguay declared its port facilities were open to Great Britain which it considered a non-belligerent. *N. Y. Times*, Feb. 7, 1942, p. 7.
- 7 NETHERLANDS (in exile)—UNITED STATES. The Department of State announced that a contingent of United States troops had been sent to Aruba and Curaçao, off Dutch Guiana. *D. S. B.*, Feb. 14, 1942, p. 153; *N. Y. Times*, Feb. 12, 1942, p. 1.
- 12 FRANCE (Free). The Free French Caisse Centrale to be established in London with a capital of 100 million francs will have the exclusive privilege of issuing notes which will circulate as legal tender. *N. Y. Times*, Feb. 13, 1942, p. 8.
- 12 HUNGARY—UNITED STATES. American-owned property in Hungary was confiscated. *C. S. Monitor*, Feb. 13, 1942, p. 1; *N. Y. Times*, Feb. 14, 1942, p. 8.

- 13 ITALY—UNITED STATES. Italy confiscated branches of the American Express Company and the Banca d'America. *C. S. Monitor*, Feb. 13, 1942, p. 1; *N. Y. Times*, Feb. 14, 1942, p. 8.

INTERNATIONAL CONVENTIONS

COLLECTION ACCOUNTS. Buenos Aires, May 23, 1939.

Adhesion: Slovakia. *D. S. B.*, Oct. 11, 1941, p. 287.

CONSULTATIVE MEETING OF FOREIGN MINISTERS OF THE AMERICAN REPUBLICS. 3d. Final Act. Rio de Janeiro, Jan. 28, 1942.

Text (non-official) and reservations: *D. S. B.*, Feb. 7, 1942, pp. 117-141; this JOURNAL, Supp., pp. 61-95.

DIPLOMATIC OFFICERS. Havana, Feb. 20, 1928.

Ratification deposited: Haiti. Jan. 31, 1942. *D. S. B.*, Feb. 21, 1942, p. 178.

EUROPEAN COLONIES AND POSSESSIONS IN THE WESTERN HEMISPHERE. Havana, July 30, 1940.

Proclaimed: United States. Feb. 12, 1942. *D. S. B.*, Feb. 14, 1942, p. 158.

Ratifications deposited:

Colombia. Nov. 5, 1941. *D. S. B.*, Nov. 29, 1941, p. 444.

Ecuador. Dec. 27, 1941. *D. S. B.*, Jan. 10, 1942, p. 51.

Honduras. Jan. 8, 1942. *D. S. B.*, Jan. 17, 1942, p. 72.

Came into force: Jan. 8, 1942. *D. S. B.*, Jan. 17, 1942, p. 72.

INTER-AMERICAN COFFEE MARKETING AGREEMENT. Washington, Nov. 28, 1940.

Ratification deposited: Cuba. Dec. 31, 1941. *D. S. B.*, Jan. 17, 1942, p. 71.

Came into force: Dec. 31, 1941. *D. S. B.*, Jan. 17, 1942, p. 71.

Text: U. S. T. S. No. 970.

INTER-AMERICAN COFFEE MARKETING AGREEMENT. Protocol. Washington, April 15, 1941.

Signature: Cuba. Dec. 31, 1941. *D. S. B.*, Jan. 17, 1942, p. 72.

INTER-AMERICAN INDIAN INSTITUTE. Mexico City, Nov. 29, 1940.

Proclaimed: United States. Feb. 12, 1942. *D. S. B.*, Feb. 14, 1942, p. 158.

Ratification deposited: Ecuador. Dec. 13, 1941. *D. S. B.*, Jan. 31, 1942, p. 110.

LETTERS, ETC., OF DECLARED VALUE. Buenos Aires, May 23, 1939.

Ratification deposited: Great Britain and colonies, etc. Oct. 21, 1941. *D. S. B.*, Jan. 31, 1942, pp. 110-112.

MONEY ORDERS. Buenos Aires, May 23, 1939.

Adhesion: Slovakia. *D. S. B.*, Oct. 11, 1941, p. 287.

NORTH AMERICAN REGIONAL BROADCASTING. Havana, Dec. 13, 1937.

Text: U. S. T. S. No. 962.

TELEGRAPH REGULATIONS. Cairo, April 8, 1938.

Approval: Brazil. [May, 1941]. *D. S. B.*, Sept. 27, 1941, p. 240.

UNIVERSAL POSTAL CONVENTION. Buenos Aires, May 23, 1939.

Ratification deposited: Great Britain and colonies, etc. Oct. 21, 1941. *D. S. B.*, Jan. 31, 1942, pp. 110-111.

WILDLIFE PRESERVATION IN THE WESTERN HEMISPHERE. Washington, Oct. 12, 1940.

Approval: Dominican Republic. Jan. 12, 1942. *D. S. B.*, Feb. 21, 1942, p. 178.

Ratifications deposited:

El Salvador. Dec. 2, 1941. *D. S. B.*, Dec. 20, 1941, p. 569.

Haiti. Jan. 31, 1942. *D. S. B.*, Feb. 14, 1942, p. 159.

Will enter into force: May 1, 1942.

DOROTHY R. DART

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* PINK *

February 2, 1942

This action was brought by the Government of the United States under the Litvinov assignment to recover a balance of more than \$1,000,000 of assets of the New York branch of the First Russian Insurance Company which remained in the hands of the Superintendent of Insurance of the State of New York after the payment of all domestic creditors, and which the New York Court of Appeals had directed him to dispose of, first, to pay claims of foreign creditors, and, second, to pay any surplus to a quorum of the board of directors of the company.

The United States is seeking to protect not only claims which it holds but also claims of its nationals. The existence of such claims and their non-payment had for years been one of the barriers to recognition of the Soviet régime by the executive department. The purpose of the discussions leading to the policy of recognition was to resolve "all questions outstanding" between the two nations. The Litvinov assignment was not only part and parcel of the new policy of recognition; it was also the method adopted by the executive department for alleviating in this country the rigors of nationalization.

The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.

If the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment to the Constitution does not stand in the way of giving full force and effect to the Litvinov assignment. There is no constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts. The fact that New York has marshaled the claims of the foreign creditors here involved and authorized their payment does not give them immunity from that general rule.

Enforcement of New York's policy would collide with and subtract from the federal policy whether it was premised on the absence of extraterritorial effect of the Russian decrees, the conception of the New York branch as a distinct juristic personality, or disapproval by New York of the Russian program of nationalization. The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the states; it is vested in the national government exclusively, and the policies of the states become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.

Dissenting opinion by Chief Justice Stone and Justice Roberts.

Mr. Justice DOUGLAS delivered the opinion of the court.

This action was brought by the United States to recover the assets of the New York branch of the First Russian Insurance Co. which remained in the hands of respondent after the payment of all domestic creditors. The material allegations of the complaint were in brief as follows:

The First Russian Insurance Co., organized under the laws of the former Empire of Russia, established a New York branch in 1907. It deposited with the Superintendent of Insurance, pursuant to the laws of New York, certain assets to secure payment of claims resulting from transactions of its New York branch. By certain laws, decrees, enactments and orders in 1918 and 1919 the Russian Government nationalized the business of

insurance and all of the property, wherever situated, of all Russian insurance companies (including the First Russian Insurance Co.), and discharged and cancelled all the debts of such companies and the rights of all shareholders in all such property. The New York branch of the First Russian Insurance Co. continued to do business in New York until 1925. At that time respondent, pursuant to an order of the Supreme Court of New York, took possession of its assets for a determination and report upon the claims of the policyholders and creditors in the United States. Thereafter all claims of domestic creditors, *i.e.*, all claims arising out of the business of the New York branch, were paid by respondent, leaving a balance in his hands of more than \$1,000,000. In 1931 the New York Court of Appeals (255 N. Y. 415) directed respondent to dispose of that balance as follows: first, to pay claims of foreign creditors who had filed attachment prior to the commencement of the liquidation proceeding and also such claims as were filed prior to the entry of the order on remittitur of that court; and second, to pay any surplus to a quorum of the board of directors of the company. Pursuant to that mandate, respondent proceeded with the liquidation of the claims of the foreign creditors. Some payments were made thereon. The major portion of the allowed claims, however, were not paid, a stay having been granted pending disposition of the claim of the United States. On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the *de jure* Government of Russia and as an incident to that recognition accepted an assignment (known as the Litvinov assignment) of certain claims.¹ The Litvinov assignment was in the form of a letter, dated November 16, 1933, to the President of the United States from Maxim Litvinov, People's Commissar for Foreign Affairs, reading as follows:

Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Government of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

¹ See Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1 (1933) for the various documents pertaining to recognition. [Printed also in this JOURNAL, Supp., Vol. 28 (1934), p. 1 *et seq.*]

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claims with respect to:

- (a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,
- (b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

This was acknowledged by the President on the same date. The acknowledgment, after setting forth the terms of the assignment, concluded:

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

On November 14, 1934, the United States brought an action in the federal District Court for the Southern District of New York, seeking to recover the assets in the hands of respondent. This court held in *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, that the well settled "principles governing the convenient and orderly administration of justice require that the jurisdiction of the state court should be respected" (p. 480); and that whatever might be "the effect of recognition" of the Russian Government, it did not terminate the state proceedings (p. 479). The United States was remitted to the state court for determination of its claim, no opinion being intimated on the merits (p. 481). The United States then moved for leave to intervene in the liquidation proceedings. Its motion was denied "without prejudice to the institution of the time-honored form of action." That order was affirmed on appeal.

Thereafter the present suit was instituted in the Supreme Court of New York. The defendants, other than respondent, were certain designated policy holders and other creditors who had presented in the liquidation proceedings claims against the corporation. The complaint prayed, *inter alia*, that the United States be adjudged to be the sole and exclusive owner entitled to immediate possession of the entire surplus fund in the hands of the respondent.

Respondent's answer denied the allegations of the complaint that title to the funds in question passed to the United States and that the Russian decrees had the effect claimed. It also set forth various affirmative defenses—that the order of distribution pursuant to the decree in 255 N. Y. 415 could not be affected by the Litvinov assignment; that the Litvinov

assignment was unenforceable because it was conditioned upon a final settlement of claims and counter claims which had not been accomplished; that under Russian law the nationalization decrees in question had no effect on property not factually taken into possession by the Russian Government prior to May 22, 1922; that the Russian decrees had no extraterritorial effect, according to Russian law; that if the decrees were given extraterritorial effect, they were confiscatory and their recognition would be unconstitutional and contrary to the public policy of the United States and of the State of New York; and that the United States under the Litvinov assignment acted merely as a collection agency for the Russian Government and hence was foreclosed from asserting any title to the property in question.

The answer was filed in March, 1938. In April, 1939 the New York Court of Appeals decided *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286. In May, 1939, respondent (but not the other defendants) moved pursuant to Rule 113 of the Rules of the New York Civil Practice Act and § 476 of that Act for an order dismissing the complaint and awarding summary judgment in favor of respondent "on the ground that there is no merit to the action and that it is insufficient in law." The affidavit in support of the motion stated that there was "no dispute as to the facts"; that the separate defenses to the complaint "need not now be considered for the complaint standing alone is insufficient in law"; that the facts in the Moscow case and the instant one, so far as material, were "parallel" and the Russian decrees the same; and that the Moscow case authoritatively settled the principles of law governing the instant one. The affidavit read in opposition to the motion stated that a petition for certiorari in the Moscow case was about to be filed in this court; that the motion was premature and should be denied or decision thereon withheld pending the final decision of this court. On June 29, 1939, the Supreme Court of New York granted the motion and dismissed the complaint "on the merits," citing only the Moscow case in support of its action. On September 2, 1939, a petition for certiorari in the Moscow case was filed in this court. The judgment in that case was affirmed here by an equally divided court. 309 U. S. 624. Subsequently the Appellate Division of the Supreme Court of New York affirmed, without opinion, the order of dismissal in the instant case. The Court of Appeals affirmed with a *per curiam* opinion (284 N. Y. 555) which after noting that the decision below was "in accord with the decision" in the Moscow case stated:

Three of the judges of this court concurred in a forceful opinion dissenting from the court's decision in that case, but the decision left open no question which has been argued upon this appeal. We are agreed that without again considering such questions this court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here.

We granted the petition for certiorari because of the nature and public importance of the questions raised.

First: Respondent insists that the complaint in this action was identical in substance and sought the same relief as the petition of the United States in the Moscow case, and that his answer set up the same defenses as were successfully sustained against the United States by the defendants in that case. He also maintains that both parties agreed on the motion for summary judgment that the decision in the Moscow case governed this cause, leaving no issues to be tried. We agree with those contentions. It is in accord not only with the motion papers but also with the ruling of the New York Court of Appeals that the Moscow case "left open no question which has been argued upon this appeal." In view of that ruling we are not free to inquire, as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the Moscow case. That is distinctly a question of state law on which New York has the last word.

But it does not follow, as respondent urges, that the writ should be dismissed as improvidently granted. The Moscow case is not *res judicata* since respondent was not a party to that suit. *Stone v. Farmers' Bank of Kentucky*, 174 U. S. 409; *Rudd v. Cornell*, 171 N. Y. 114, 127-128; *St. John v. Fowler*, 229 N. Y. 270, 274. Nor was our affirmance of the judgment in that case by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy (*Durant v. Essex Co.*, 7 Wall. 107), the lack of an agreement by a majority of the court on the principles of law involved prevents it from being an authoritative determination for other cases. *Hertz v. Woodman*, 218 U. S. 205, 213-214.

The upshot of the matter is that we now reach the issues in the Moscow case in so far as they are embraced in the pleadings in this case. And there is no reason why we cannot take judicial notice of the record in this court of the Moscow case. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 217; *Dimmick v. Tompkins*, 194 U. S. 540, 548; *Freshman v. Atkins*, 269 U. S. 121, 124.

Second: The New York Court of Appeals held in the Moscow case that the Russian decrees¹ in question had no extraterritorial effect. If that is true,

¹ The three decrees on which the United States placed primary emphasis (apart from the one set forth in note 3, *infra*) were described in the findings of the referee in the Moscow case as follows:

"88. The decree of November 18, 1919 on the annulment of life insurance contracts abolished insurance of life in all its forms in the Republic and annulled all contracts with insurance companies and savings banks with respect to the insurance of life, capital and income.

"89. The decree of the Soviet of People's Commissars dated March 4, 1919, on the liquidation of obligations of State enterprises, provided that stock certificates and shares of joint stock companies, whose enterprises have been either nationalized or sequestered, are an-

it is decisive of the present controversy. For the United States acquired under the Litvinov assignment only such rights as Russia had. *Guaranty Trust Co. v. United States*, 304 U. S. 126, 143. If the Russian decrees left the New York assets of the Russian insurance companies unaffected, then Russia had nothing here to assign. But that question of foreign law is not to be determined exclusively by the state court. The claim of the United States based on the Litvinov assignment raises a federal question. *United States v. Belmont*, 301 U. S. 324. This court will review or independently determine all questions on which a federal right is necessarily dependent. *United States v. Ansonia Brass & Copper Co.*, 218 U. S. 452, 462-463, 471; *Ancient Egyptian Order v. Michaux*, 279 U. S. 737, 744-745; *Broad River Power Co. v. South Carolina*, 281 U. S. 537, 540; *Pierre v. Louisiana*, 306 U. S. 354, 358. Here title obtained under the Litvinov assignment depends on a correct interpretation of Russian law. As in cases arising under the full faith and credit clause (*Huntington v. Attrill*, 146 U. S. 657, 684; *Adam v. Saenger*, 303 U. S. 59, 64), these questions of foreign law on which the asserted federal right is based are not peculiarly within the cognizance of the local courts. While deference will be given to the determination of the state court, its conclusion is not accepted as final.

We do not stop to review all the evidence in the voluminous record of the Moscow case bearing on the question of the extraterritorial effect of the Russian decrees of nationalization, except to note that the expert testimony tendered by the United States gave great credence to its position. Subsequent to the hearings in that case, however, the United States, through diplomatic channels, requested the Commissariat for Foreign Affairs of the Russian Government to obtain an official declaration by the Commissariat for Justice of the R.S.F.S.R. which would make clear, as a matter of Russian law, the intended effect of the Russian decree³ nationalizing insurance com-

nulled and also provided that such enterprises are free from the payment of all debts to private persons and enterprises which have arisen prior to the nationalization of these enterprises, including payments on bond loans with the exception only of wages due to workers and employees.

"90. The decree of the Soviet of People's Commissars dated June 28, 1918 provides in Article I that the commercial and industrial enterprises enumerated therein, which are located within the boundaries of the Soviet Republic, together with all their capital and property, regardless of what the latter may consist, are declared the property of the Republic."

³ Relevant portions of the Insurance Decree dated November 28, 1918, translated in accordance with the findings of the referee in the Moscow case, are:

"603. On the organization of the insurance business in the Russian Republic.

"(1) Insurance in all its forms, such as: fire insurance, insurance on shipments, life insurance, accident insurance, hail insurance, livestock insurance, insurance against failure of crops, etc. is hereby proclaimed as a State monopoly.

"*Note*—Mutual insurance of movable goods and merchandise by the coöperative organizations is conducted on a special basis.

panies upon the funds of such companies outside of Russia. The official declaration, dated November 28, 1937, reads as follows:

The People's Commissariat for Justice of the R.S.F.S.R. certifies that by virtue of the laws of the organs of the Soviet Government all nationalized funds and property of former private enterprises and companies, in particular, by virtue of the decree of November 28, 1918 (Collection of Laws of the R.S.F.S.R., 1918, No. 86, Article 904), the funds and property of former insurance companies, constitute the property of the State, irrespective of the nature of the property, and irrespective of whether it was situated within the territorial limits of the R.S.F.S.R. or abroad.

The referee in the Moscow case found, and the evidence supported his finding, that the Commissariat for Justice has power to interpret existing Russian law. That being true this official declaration is conclusive so far as the intended extraterritorial effect of the Russian decree is concerned. This official declaration was before the court below though it was not a part of the record. It was tendered pursuant to § 391 of the New York Civil Practice Act as amended by L. 1933, c. 690.⁴ In New York it would seem

"(2) All private insurance companies and organizations (stock and share holding, also mutual) upon issuance of this decree are subject to liquidation; former rural * (People's Soviet) and municipal mutual insurance organizations operating within the boundaries of the Russian Republic are hereby proclaimed the property of the Russian Socialist Federated Soviet Republic.

"(3) For the immediate organization of the insurance business and for the liquidation of parts of insurance institutions, which have become the property of the Russian Socialist Federated Soviet Republic, a Commission is established under the Supreme Soviet of National Economy, consisting of representatives of the Supreme Soviet of National Economy, the People's Commissariats of Commerce and Industry, Interior Affairs, the Commissar of Insurance and Fire Prevention, Finances, Labor, and State Control, and of Soviet Insurance Organizations (People's Soviet and Municipal Mutual).

"*Note.*—The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, remaining on hand after their liquidation, shall become the property of the Russian Socialist Federated Soviet Republic.

"(4) The above-mentioned reorganization and liquidation of existing insurance organizations and institutions shall be accomplished not later than the first day of April 1919.

"(8) The present decree comes into force on the day of its publication.

The referee in the Moscow case found that upon publication of this decree all Russian insurance companies were prohibited from engaging in the insurance business in Russia; that they became subject to liquidation and were dissolved; that all of their assets in Russia became the property of the State; that on publication of the decree, the directors of the companies lost all power to act as directors or conservators of the property or to represent the companies in any way; and that the Russian Government became the statutory successor and domiciliary liquidator of companies whose property was nationalized.

⁴ That section reads:

"A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the ex-

"* zemskie."

that foreign law must be found by the court (or in case of a jury trial, binding instructions must be given), though procedural considerations require it to be presented as a question of fact. *Fitzpatrick v. International Railway Co.*, 252 N. Y. 127; *Petrogradsky M. K. Bank v. National City Bank*, 253 N. Y. 23. And under § 391 as amended it is clear that the New York appellate court has authority to consider appropriate decisions interpreting foreign law even though they are rendered subsequent to the trial. *Los Angeles Investment Securities Corp. v. Joslyn*, 282 N. Y. 438. We can take such notice of the foreign law as the New York court could have taken.⁵ *Adam v. Saenger, supra*. We conclude that this official declaration of Russian law was not only properly before the court on appeal but also that it was embraced within those "written authorities" which § 391 authorizes the court to consider, even though not introduced in evidence on the trial. For while it was not "printed," it would seem to be "other written law" of unquestioned authenticity and authority within the meaning of § 391.

We hold that so far as its intended effect⁶ is concerned the Russian decree embraced the New York assets of the First Russian Insurance Co.

Third: The question of whether the decree should be given extraterritorial effect is of course a distinct matter. One primary issue raised in that connection is whether under our constitutional system New York law can be allowed to stand in the way.

The decision of the New York Court of Appeals in the Moscow case is unequivocal. It held that "under the law of this State such confiscatory decrees do not affect the property claimed here" (280 N. Y. 314); that the property of the New York branch acquired a "character of its own" which was "dependent" on the law of New York (p. 310); that no "rule of comity and no act of the United States Government constrains this State to abandon any part of its control or to share it with a foreign State" (p. 310); that although the Russian decree effected the death of the parent company, the situs of the property of the New York branch was in New York; and

ecutive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or referee and included in the findings of the court or referee or charged to the jury, as the case may be. Such finding or charge is subject to review on appeal. In determining such law, neither the trial court nor any appellate court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this section, with the same force and effect as if the same had been admitted in evidence."

⁵ Hence the denial of the motion of the United States to certify the official declaration as part of the record of the Moscow case in this court (281 N. Y. 818) would seem immaterial to our right to consult it.

⁶ See also note 7, *infra*.

that no principle of law forces New York to forsake the method of distribution authorized in the earlier appeal (255 N. Y. 415) and to hold that "the method which in 1931 conformed to the exactions of justice and equity must be rejected because retroactively it has become unlawful" (p. 312).

It is one thing to hold as was done in *Guaranty Trust Co. v. United States*, *supra* (p. 142), that under the Litvinov assignment the United States did not acquire "a right free of a preëxisting infirmity" such as the running of the statute of limitations against the Russian Government, its assignor. Unlike the problem presented here and in the Moscow case, that holding in no way sanctions the asserted power of New York to deny enforcement of a claim under the Litvinov assignment because of an overriding policy of the state which denies validity in New York of the Russian decrees on which the assigned claims rest. That power was denied New York in *United States v. Belmont*, *supra*. With one qualification to be noted, the Belmont case is determinative of the present controversy.

That case involved the right of the United States under the Litvinov assignment to recover from a custodian or stakeholder in New York funds which had been nationalized and appropriated by the Russian decrees.

This court, speaking through Mr. Justice Sutherland, held that the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; that the propriety of the exercise of that power is not open to judicial inquiry; and that recognition of a foreign sovereign conclusively binds the courts and "is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence" (p. 328). It further held (p. 330) that recognition of the Soviet Government, the establishment of diplomatic relations with it, and the Litvinov assignment were "all parts of one transaction, resulting in an international compact between the two governments." After stating that "in respect of what was done here, the Executive had authority to speak as the sole organ" of the national government, it added (p. 330): "The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty-making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate." It held (p. 331) that the "external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning." And it added that "all international compacts and agreements" are to be treated with similar dignity for the reason that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states" (p. 331). This court did not stop to inquire whether in fact there was any policy of New York which enforcement of the Litvinov assignment would infringe since "no state policy can prevail against the international compact here involved" (p. 327).

The New York Court of Appeals in the Moscow case (280 N. Y. 309) distinguished the Belmont case on the ground that it was decided on the sufficiency of the pleadings, the demurrer to the complaint admitting that under the Russian decree the property was confiscated by the Russian Government and then transferred to the United States under the Litvinov assignment. But, as we have seen, the Russian decree in question was intended to have an extraterritorial effect and to embrace funds of the kind which are here involved. Nor can there be any serious doubt that claims of the kind here in question were included in the Litvinov assignment.⁷ It

⁷ A clarification of the Litvinov assignment was made in an exchange of letters between the American Chargé d'Affairs and the People's Commissar for Foreign Affairs on January 7, 1937. The letter of the former read:

"I have the honor to inform you that it is the understanding of the Government of the United States that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.

"The Government of the United States further understands that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the United States Court of Claims, and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by you to the President of the United States on November 16, 1933.

"Will you be good enough to confirm the understanding which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment?"

The reply of the People's Commissar of Foreign Affairs was:

"In reply to your note of January 7, 1937, I have the honor to inform you that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.

"You are further informed that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the United States Court of Claims,

is broad and inclusive. It should be interpreted consonantly with the purpose of the compact to eliminate all possible sources of friction between these two great nations. See *Tucker v. Alexandroff*, 183 U. S. 424, 437; *Jordan v. Tashiro*, 278 U. S. 123, 127. Strict construction would run counter to that national policy. For, as we shall see, the existence of unpaid claims against Russia and its nationals which were held in this country and which the Litvinov assignment was intended to secure, had long been one impediment to resumption of friendly relations between these two great Powers.

The holding in the Belmont case is therefore determinative of the present controversy unless the stake of the foreign creditors in this liquidation proceeding and the provision which New York has provided for their protection call for a different result.

Fourth: The Belmont case forecloses any relief to the Russian corporation. For this court held in that case (301 U. S. at p. 332): ". . . our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens. . . . What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."

But it is urged that different considerations apply in case of the foreign creditors⁸ to whom the New York Court of Appeals (255 N. Y. 415) ordered distribution of these funds. The argument is that their rights in these funds have vested by virtue of the New York decree; that to deprive them of the property would violate the Fifth Amendment which extends its protection to aliens as well as to citizens; and that the Litvinov assignment cannot deprive New York of its power to administer the balance of the fund in accordance with its laws for the benefit of these creditors.

At the outset it should be noted that, so far as appears, all creditors whose claims arose out of dealings with the New York branch have been paid. Thus we are not faced with the question whether New York's policy of protecting the so-called local creditors by giving them priority in the assets deposited with the state (*Matter of People*, 242 N. Y. 148, 158-159) should

and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by me to the President of the United States on November 16, 1933.

"I have the honor, therefore, to confirm the understanding, as expressed in your note of January 7, 1937, which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment."

⁸ In view of the disposition which we make of this case, we express no view on whether these creditors would be barred from asserting their claims here by virtue of the ruling in *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 538, that "anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

be recognized within the rule of *Clark v. Williard*, 294 U. S. 211, or should yield to the federal policy expressed in the international compact or agreement. *Santovincenzo v. Egan*, 284 U. S. 30, 40; *United States v. Belmont*, *supra*. We intimate no opinion on that question. The contest here is between the United States and creditors of the Russian corporation who, we assume, are not citizens of this country and whose claims did not arise out of transactions with the New York branch. The United States is seeking to protect not only claims which it holds but also claims of its nationals. H. Rep. No. 865, 76th Cong., 1st Sess. Such claims did not arise out of transactions with this Russian corporation; they are, however, claims against Russia or its nationals. The existence of such claims and their non-payment had for years been one of the barriers to recognition of the Soviet régime by the executive department. Graham, "Russian-American Relations, 1917-1933: An Interpretation," 28 Am. Pol. Sc. Rev. 387; 1 Hackworth, *Digest of International Law* (1940), pp. 302-304. The purpose of the discussions leading to the policy of recognition was to resolve "all questions outstanding" between the two nations. *Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics*, Dept. of State, Eastern European Series, No. 1 (1933), p. 1. Settlement of all American claims against Russia was one method of removing some of the prior objections to recognition based on the Soviet policy of nationalization. The Litvinov assignment was not only part and parcel of the new policy of recognition (*id.*, p. 13); it was also the method adopted by the executive department for alleviating in this country the rigors of nationalization. Congress tacitly recognized that policy. Acting in anticipation of the realization of funds under the Litvinov assignment (H. Rep. No. 865, 76th Cong., 1st Sess.) it authorized the appointment of a commissioner to determine the claims of American nationals against the Soviet Government. Joint Resolution of August 4, 1939, 53 Stat. 1199.

If the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov assignment. To be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment. *Russian Volunteer Fleet v. United States*, 282 U. S. 481. A state is not precluded, however, by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of foreign countries and whose claims arose abroad. *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570. By the same token, the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors. And it matters not that the procedure adopted by the Federal Government is globular and involves a regrouping of assets. There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts. There is

no reason why it may not through such devices as the Litvinov assignment make itself and its nationals whole from assets here before it permits such assets to go abroad in satisfaction of claims of aliens made elsewhere and not incurred in connection with business conducted in this country. The fact that New York has marshaled the claims of the foreign creditors here involved and authorized their payment does not give them immunity from that general rule.

If the priority had been accorded American claims by treaty with Russia, there would be no doubt as to its validity. *Cf. Santovincenzo v. Egan, supra*. The same result obtains here. The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co. v. United States, supra*, p. 137. That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts. See *Guaranty Trust Co. v. United States, supra*, p. 138; *Kennett v. Chambers*, 14 How. 38, 50-51. As we have noted, this court in the Belmont case recognized that the Litvinov assignment was an international compact which did not require the participation of the Senate. It stated (301 U. S. pp. 330-331): "There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations." And see *Monaco v. Mississippi*, 292 U. S. 313, 331; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 318. Recognition is not always absolute; it is sometimes conditional. 1 Moore, *International Law Digest* (1906), pp. 73-74; 1 Hackworth, *Digest of International Law* (1940), pp. 192-195. Power to remove such obstacles to full recognition as settlement of claims of our nationals (Levitan, "Executive Agreements," 35 Ill. L. Rev. 365, 382-385) certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Corp., supra*, p. 320. Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs (see Moore, "Treaties and Executive Agreements," 20 Pol. Sc. Q. 385, 403-417) is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding

problems including the claims of our nationals. Recognition and the Litvinov assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.

"All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; . . ." *The Federalist*, No. 64. A treaty is a "Law of the Land" under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov assignment have a similar dignity. *United States v. Belmont*, *supra*, p. 331. See Corwin, *The President, Office & Powers* (1940), pp. 228-240.

It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the states of this nation unless clearly necessary to effectuate the national policy. *Guaranty Trust Co. v. United States*, *supra*, p. 143 and cases cited. For example in *Todok v. Union State Bank*, 281 U. S. 449, this court took pains in its construction of a treaty, relating to the power of an alien to dispose of property in this country, not to invalidate the provisions of state law governing such dispositions. Frequently the obligation of a treaty will be dependent on state law. *Prevost v. Greneaux*, 19 How. 1. But state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. See *Nielsen v. Johnson*, 279 U. S. 47. Then the power of a state to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum (*Griffin v. McCoach*, 313 U. S. 498, 506) must give way before the superior federal policy evidenced by a treaty or international compact or agreement. *Santovincenzo v. Egan*, *supra*; *United States v. Belmont*, *supra*.

Enforcement of New York's policy as formulated by the Moscow case would collide with and subtract from the federal policy, whether it was premised on the absence of extraterritorial effect of the Russian decrees, the conception of the New York branch as a distinct juristic personality, or disapproval by New York of the Russian program of nationalization.⁹ For the Moscow case refuses to give effect or recognition in New York to acts of the

⁹ In this connection it should be noted that § 977 (b) of the New York Civil Practice Act provides for the appointment of a receiver to liquidate local assets of a foreign corporation where, *inter alia*, it has been dissolved, liquidated, or nationalized. Subdivision 19 of that section provides in part:

" . . . such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state."

Soviet Government which the United States by its policy of recognition agreed no longer to question. Enforcement of such state policies would indeed tend to restore some of the precise impediments to friendly relations which the President intended to remove on inauguration of the policy of recognition of the Soviet Government. In the first place, such action by New York, no matter what gloss be given it, amounts to official disapproval or non-recognition of the nationalization program of the Soviet Government. That disapproval or non-recognition is in the face of a disavowal by the United States of any official concern with that program. It is in the face of the underlying policy adopted by the United States when it recognized the Soviet Government. In the second place, to the extent that the action of the state in refusing enforcement of the Litvinov assignment results in reduction or non-payment of claims of our nationals, it helps keep alive one source of friction which the policy of recognition intended to remove. Thus the action of New York tends to restore some of the precise irritants which had long affected the relations between these two great nations and which the policy of recognition was designed to eliminate.

We recently stated in *Hines v. Davidowitz*, 312 U. S. 52, 68, that the field which affects international relations is "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority"; and that any state power which may exist "is restricted to the narrowest of limits." There we were dealing with the question as to whether a state statute regulating aliens survived a similar federal statute. We held that it did not. Here we are dealing with an exclusive federal function. If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a state created difficulties with a foreign Power. Cf. *Chy Lung v. Freeman*, 92 U. S. 275, 279-280. Certainly the conditions for "enduring friendship" between the nations, which the policy of recognition in this instance was designed to effectuate,¹⁰ are not likely to flourish where contrary to national policy a lingering atmosphere of hostility is created by state action.

Such considerations underly the principle of *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302-303, that when a revolutionary government is recognized as a *de jure* government, "such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence." They also explain the rule expressed in *Underhill v. Hernandez*, 168 U. S. 250, 252, that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

¹⁰ *Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics*, *supra*, note 1, p. 20.

The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a state in our constitutional system. To permit it would be to sanction a dangerous invasion of federal authority. For it would "imperil the amicable relations between governments and vex the peace of nations." *Oetjen v. Central Leather Co.*, *supra*, p. 304. It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government had diligently endeavored to establish.

We repeat that there are limitations on the sovereignty of the states. No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the states; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the states become wholly irrelevant to judicial inquiry, when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts. For such reasons, Mr. Justice Sutherland stated in *United States v. Belmont*, *supra*, p. 331, "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."

We hold that the right to the funds or property in question became vested in the Soviet Government as the successor to the First Russian Insurance Co.; that this right has passed to the United States under the Litvinov assignment; and that the United States is entitled to the property as against the corporation and the foreign creditors.

The judgment is reversed and the cause is remanded to the Supreme Court of New York for proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice REED and Mr. Justice JACKSON did not participate in the consideration or decision of this case.

Mr. Justice FRANKFURTER.

The nature of the controversy makes it appropriate to add a few observations to my brother DOUGLAS' opinion.

Legal ideas like other organisms cannot survive severance from their congenial environment. Concepts like "situs" and "jurisdiction" and "comity" summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of a private litigation, is to invoke a narrow and inadmissible frame of reference.

The expropriation decrees of the U.S.S.R. gave rise to extensive litigation

among various classes of claimants to funds belonging to Russian companies doing business or keeping accounts abroad. England and New York were the most active centers of this litigation. The opinions in the many cases before their courts constitute a sizeable library. They all derive from a single theme—the effect of the Russian expropriation decrees upon particular claims, in some cases before and in some cases after recognition of the U.S.S.R., either *de jure* or *de facto*. One cannot read this body of judicial opinions, in the Divisional Court, the Court of Appeal and the House of Lords, in the New York Supreme Court, the Appellate Division, and the Court of Appeals, and not be left with the conviction that they are the product largely of casuistry, confusion, and indecision. See Jaffe, *Judicial Aspects of Foreign Relations*, *passim*. The difficulties were inherent in the problems that confronted the courts. They were due to what Chief Judge Cardozo called “the hazards and embarrassments growing out of the confiscatory decrees of the Russian Soviet Republic,” *Matter of People (Russian Reinsurance Co.)*, 255 N. Y. 415, 420, and to the endeavor to adjust these “hazards and embarrassments” to “the largest considerations of public policy and justice,” *James & Co. v. Second Russian Insurance Co.*, 239 N. Y. 248, 256, when private claims to funds covered by the expropriation decrees were before the courts, particularly at a time when non-recognition was our national policy.

The opinions show both the English and the New York courts struggling to deal with these business consequences of major international complications through the application of traditional judicial concepts. “Situs,” “jurisdiction,” “comity,” “domestication” and “dissolution” of corporations, and other legal ideas that often enough in litigation of a purely domestic nature prove their limitations as instruments for solution or even as means for analysis, were pressed into service for adjudicating claims whose international implications could not be sterilized. This accounts for the divergence of views among the judges and for such contradictory and confusing rulings as the series of New York cases, from *Wulfsohn v. Soviet Republic*, 234 N. Y. 372, to the ruling now under review, *Moscow Fire Ins. Co. v. Bank of New York and Trust Co.*, 280 N. Y. 286, accounts for *Russian Commercial and Industrial Bank v. Comptoir d’Escompte de Mulhouse*, [1925] A. C. 112, compared with *Lazard Brothers & Co. v. Midland Bank*, [1933] A. C. 289, and for the fantastic decision in *Lehigh Valley R. Co. v. State of Russia*, 21 F. 2d 396, in which the Kerensky régime was treated as the existing Russian Government a decade after its extinction.

Courts could hardly escape perplexities when citizens asserted claims to Russian funds within the control of the forum. But a totally different situation was presented when all claims of local creditors were satisfied and only the conflicting claims of Russia and of former Russian creditors were involved. In the particular circumstances of Russian insurance companies doing business in New York, the State Superintendent of Insurance took

possession of the assets of the Russian branches in New York to conserve them for the benefit of those entitled to them. Liquidation followed, domestic creditors and policy holders were paid, and the Superintendent found a large surplus on his hands. As statutory liquidator, the Superintendent of Insurance took the ground that "in view of the hazards and uncertainties of the Russian situation, the surplus should not be paid to any one, but should be left in his hands indefinitely, until a government recognized by the United States shall function in the territory of what was once the Russian Empire." 255 N. Y. 415, 421. So the Appellate Division decreed. 229 App. Div. 637. But the Court of Appeals reversed and the scramble among the foreign claimants was allowed to proceed. 255 N. Y. 415. The Court of Appeals held that the retention of the surplus funds in the custody of the Superintendent of Insurance until the international relations between the United States and Russia had been formalized "did not solve the problem. It adjourned it *sine die*." But adjournment it may be suggested, is sometimes a constructive interim solution to avoid a temporizing and premature measure giving rise to new difficulties. Such I believe to have been the mischief that was bound to follow the rejection of the Superintendent's policy of conservation of the surplus Russian funds until recognition. Their disposition was inescapably entangled in recognition.

In the immediate case the United States sues, in effect, as the assignee of the Russian Government for claims by that government against the Russian Insurance Company for monies on deposit in New York to which no American citizen makes claim. No manner of speech can change the central fact that here are monies which belonged to a Russian company and for which the Russian Government has decreed payment to itself.

And so the question is whether New York can bar Russia from realizing on its decrees against these funds in New York after formal recognition by the United States of Russia and in light of the circumstances that led up to recognition and the exchange of notes that attended it. For New York to deny the effectiveness of these Russian decrees under such circumstances would be to oppose, at least in some respects, its notions as to the effect which should be accorded recognition as against that entertained by the national authority for conducting our foreign affairs. And the result is the same whether New York accomplishes it because its courts invoke judicial views regarding the enforcement of foreign expropriation decrees, or regarding the survival in New York of a Russian business which according to Russian law had ceased to exist, or regarding the power of New York courts over funds of Russian companies owing from New York creditors. If this court is not bound by the construction which the New York Court of Appeals places upon complicated transactions in New York in determining whether they come within the protection of the Constitution against impairing the obligations of contract, we certainly should not be bound by that court's construction of transactions so entangled in international significance as the

status of New York branches of Russian companies and the disposition of their assets. Compare *Appleby v. City of New York*, 271 U. S. 364, and *Irving Trust Company v. Day*, 314 U. S.—. When the decision of a question of fact or of local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, we are not foreclosed by the state court's determination of the facts or of the local law. Otherwise national authority could be frustrated by local rulings. See *Creswill v. Knights of Pythias*, 225 U. S. 246; *Davis v. Wechsler*, 263 U. S. 22.

It is not consonant with the sturdy conduct of our foreign relations that the effect of Russian decrees upon Russian funds in this country should depend on such gossamer distinctions as those by which courts have determined that Russian branches survive the death of their Russian origin. When courts deal with such essentially political phenomena as the taking over of Russian businesses by the Russian Government by resorting to the forms and phrases of conventional corporation law, they inevitably fall into a dialectic quagmire. With commendable candor, the House of Lords frankly confessed as much when it practically overruled *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, *supra*, saying through Lord Wright, "the whole matter has now to be reconsidered in the light of new evidence and of the historical evolution of ten years." *Lazard Brothers & Co. v. Midland Bank*, [1933] A. C. 289, 300.

For we are not dealing here with physical property—whether chattels or realty. We are dealing with intangible rights, with choses in action. The fact that these claims were reduced to money does not change the character of the claims and certainly is too tenuous a thread on which to determine issues affecting the relation between nations. Corporeal property may give rise to rules of law which, we have held, even in purely domestic controversies ought not to be transferred to the adjudication of impalpable claims such as are here in controversy. *Curry v. McCanless*, 307 U. S. 357, 363 *et seq.*

As between the states, due regard for their respective governmental acts is written into the Constitution by the full faith and credit clause (Art. IV, § 1). But the scope of its operation—when may the policy of one state deny the consequences of a transaction authorized by the laws of another—has given rise to a long history of judicial subtleties which hardly commend themselves for transfer to the solution of analogous problems between friendly nations. See *Huntington v. Attrill*, 146 U. S. 657; *Finney v. Guy*, 189 U. S. 335; *Milwaukee County v. White Co.*, 296 U. S. 268; *Pacific Ins. Co. v. Comm'n*, 306 U. S. 493, 502; *Pink v. A. A. A. Highway Express*, 314 U. S.—.

For more than fifteen years formal relations between the United States and Russia were broken because of serious differences between the two countries regarding the consequences to us of two major Russian policies. This complicated process of friction, abstention from friendly relations, efforts at accommodation, and negotiations for removing the causes of friction, are summarized by the delusively simple concept of "non-recognition." The

history of Russo-American relations leaves no room for doubt that the two underlying sources of difficulty were Russian propaganda and expropriation. Had any state court during this period given comfort to the Russian views in this contest between its government and ours, it would, to that extent, have interfered with the conduct of our foreign relations by the Executive even if it had purported to do so under the guise of enforcing state law in a matter of local policy. On the contrary, during this period of non-recognition New York denied Russia access to her courts and did so on the single and conclusive ground: "We should do nothing to thwart the policy which the United States has adopted." *Russian Republic v. Cibrario*, 235 N. Y. 255, 263. Similarly, no invocation of a local rule governing "situs" or the survival of a domesticated corporation, however applicable in an ordinary case, is within the competence of a state court if it would thwart to any extent "the policy which the United States has adopted" when the President reestablished friendly relations in 1933.

And it would be thwarted if the judgment below were allowed to stand.

That the President's control of foreign relations includes the settlement of claims is indisputable. Thus, referring to the adhesion of the United States to the Dawes Plan, Secretary of State Hughes reported "that this agreement was negotiated under the long-recognized authority of the President of the United States to arrange for the payment of claims in favor of the United States and its nationals. The exercise of this authority has many illustrations, one of which is the Agreement of 1901 for the so-called Boxer Indemnity." (Secretary Hughes to President Coolidge, February 3, 1925, MS., Department of State, quoted in 5 Hackworth, *Digest of Int. Law*, c. 16, § 514.) The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations, as was the case with Russia.

That the power to establish such normal relations with a foreign country belongs to the President is equally indisputable. Recognition of a foreign country is not a theoretical problem or an exercise in abstract symbolism. It is the assertion of national power directed towards safeguarding and promoting our interests and those of civilization. Recognition of a revolutionary government normally involves the removal of areas of friction. As often as not, areas of friction are removed by the adjustment of claims pressed by this country on behalf of its nationals against a new régime.

Such a settlement was made by the President when this country resumed normal relations with Russia. The two chief barriers to renewed friendship with Russia—intrusive propaganda and the effects of expropriation decrees upon our nationals—were at the core of our negotiations in 1933, as they had been for a good many years. The exchanges between the President and Ambassador Litvinov must be read not in isolation but as the culmination of difficulties and dealings extending over fifteen years. And they must be

read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy. The draftsmen of such notes must save sensibilities and avoid the explicitness on which diplomatic negotiations so easily founder.

The controlling history of the Soviet régime and of this country's relations with it must be read between the lines of the Roosevelt-Litvinov agreement. One needs to be no expert in Russian law to know that the expropriation decrees intended to sweep the assets of Russian companies taken over by that government into Russia's control no matter where those assets were credited. Equally clear is it that the assignment by Russia meant to give the United States as part of the comprehensive settlement everything that Russia claimed under its laws against Russians. It does violence to the course of negotiations between the United States and Russia and to the scope of the final adjustment to assume that a settlement thus made on behalf of the United States—to settle both money claims and to soothe feelings—was to be qualified by the variant notions of the courts of the forty-eight states regarding "situs" or "jurisdiction" over intangibles or the survival of extinct Russian corporations. In our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.

Mr. Chief Justice STONE, dissenting.

I think the judgment should be affirmed.

As my brethren are content to rest their decision on the authority of the dictum in *United States v. Belmont*, 301 U. S. 324, without the aid of any pertinent decision of this court, I think a word should be said of the authority and reasoning of the *Belmont* case and of the principles which I think are controlling here.

In the *Belmont* case the United States brought suit in the federal court to recover a debt alleged to be due upon a deposit account of a Russian national with a New York banker. The complaint set up the confiscation of the account by decrees of the Soviet Government and the transfer of the debt to the United States by the Litvinov assignment, concurrently with our diplomatic recognition of that government. It was not alleged, nor did it appear, that the New York courts had, subsequent to recognition, refused to give effect to the Soviet decrees as operating to transfer the title of Russian nationals to property located in New York. No such national or any adverse claimant was a party to the suit. In sustaining the complaint against demurrer this court said (p. 332): "In so holding, we deal only with the case as now presented and with the parties now before us. We do not consider the status of adverse claims, if there be any, of others not parties to this action. And nothing we have said is to be construed as foreclosing the assertion of any such claim to the fund involved, by intervention or other ap-

propriate proceeding. We decide only that the complaint alleges facts sufficient to constitute a cause of action against the respondents."

The questions thus explicitly reserved are presented by the case now before us. The courts of New York, in the exercise of the constitutional authority ordinarily possessed by state courts to declare the rules of law applicable to property located within their territorial limits, have refused to recognize the Soviet decrees as depriving creditors and other claimants representing the interests of the insurance company of their rights under New York law. Numerous individual creditors and other claimants, and the New York Superintendent of Insurance, who represents all claimants, are parties to the present suit and assert their claims to the exclusion of the United States.

It is true that this court, in the Belmont case, indulged in some remarks as to the effect on New York law of our diplomatic recognition of the Soviet Government and of the assignment of all its claims against American nationals to the United States. Upon the basis of these observations it thought that the New York courts were bound to recognize and apply the Soviet decrees to property which was located in New York when the decrees were promulgated. But all this was predicated upon the mistaken assumption that by disregarding the decrees the New York courts would be giving an extraterritorial effect to New York law. These observations were irrelevant to the decision there announced and, for reasons shortly to be given, I think plainly inapplicable here. They were but *obiter dicta* which, so far as they have not been discredited by our decision in *Guaranty Trust Co. v. United States*, 304 U. S. 126, and so far as they now merit it "may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399; Mr. Justice Sutherland in *Williams v. United States*, 289 U. S. 553, 568.

We have no concern here with the wisdom of the rules of law which the New York courts have adopted in this case or their consonance with the most enlightened principles of jurisprudence. State questions do not become federal questions because they are difficult or because we may think that the state courts have given wrong answers to them. The only questions before us are whether New York has constitutional authority to adopt its own rules of law defining rights in property located in the state, and if so whether that authority has been curtailed by the exercise of a superior federal power by recognition of the Soviet Government and acceptance of its assignment to the United States of claims against American nationals, including the New York property.

I shall state my grounds for thinking that the pronouncements in the Belmont case, on which the court relies for the answer to these questions, are without the support of reason or accepted principles of law. No one doubts that the Soviet decrees are the acts of the government of the Russian

state which is sovereign in its own territory, and that in consequence of our recognition of that government they will be so treated by our State Department. As such, when they affect property which was located in Russia at the time of their promulgation, they are subject to inquiry if at all only through our State Department and not in our courts. *Underhill v. Hernandez*, 168 U. S. 250; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Ricaud v. American Metal Co.*, 246 U. S. 304, 308-10; *Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220. But the property to which the New York judgment relates has at all relevant times been in New York in the custody of the Superintendent of Insurance as security for the policies of the insurance company, and is now in the Superintendent's custody as Liquidator acting under the direction of the New York courts. *United States v. Bank of New York Co.*, 296 U. S. 463, 478-79. In administering and distributing the property thus within their control, the New York courts are free to apply their own rules of law including their own doctrines of conflict of laws, see *Erie Railroad v. Tompkins*, 304 U. S. 64, 78; *Griffin v. McCoach*, 313 U. S. 498; *Kryger v. Wilson*, 242 U. S. 171, 176, except in so far as they are subject to the requirements of the full faith and credit clause—a clause applicable only to the judgments and public acts of states of the Union and not those of foreign states. *Aetna Life Insurance Co. v. Tremblay*, 223 U. S. 185; *cf. Bank of Augusta v. Earle*, 13 Pet. 519, 589-90; *Bond v. Hume*, 243 U. S. 15, 21-22.

This court has repeatedly decided that the extent to which a state court will follow the rules of law of a recognized foreign country in preference to its own is wholly a matter of comity, and that in the absence of relevant treaty obligations the application in the courts of a state of its own rules of law rather than those of a foreign country raises no federal question. *Rose v. Himely*, 4 Cranch 241; *Harrison v. Sterry*, 5 Cranch 289; *United States v. Crosby*, 7 Cranch 115; *Oakey v. Bennett*, 11 How. 33, 43-46; *Hilton v. Guyot*, 159 U. S. 113, 165-66; *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570; *cf. Baglin v. Cusenier*, 221 U. S. 580, 594-97; *United States v. Guaranty Trust Co.*, 293 U. S. 340, 345-47. This is equally the case when a state of the Union refuses to apply the law of a sister state, if there is no question of full faith and credit, *Kryger v. Wilson*, *supra*; *Finney v. Guy*, 189 U. S. 335, 340, 346; *Alropa Corp. v. Kirchwehm*, 313 U. S. 549; see *Milwaukee County v. White Co.*, 296 U. S. 268, 272-73, or due process, *Home Ins. Co. v. Dick*, 281 U. S. 397. So clearly was this thought to be an appropriate exercise of the power of a forum over property within its territorial jurisdiction that this court, in *Ingenohl v. Olsen & Co.*, 273 U. S. 541, 544-45, accepted as beyond all doubt the right of the British courts in Hong Kong to refuse recognition to the American Alien Property Custodian's transfer of exclusive rights to the use of a trademark in Hong Kong, and the court gave effect here to the Hong Kong judgment.

In the application of this doctrine this court has often held that a state

following its own law and policy may refuse to give effect to a transfer made elsewhere of property which is within its own territorial limits. *Green v. Van Buskirk*, 5 Wall. 307, 311-12; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624; *Clark v. Williard*, 292 U. S. 112, 122; *Clark v. Williard*, 294 U. S. 211. So far is a state free in this respect that the full faith and credit clause does not preclude the attachment by local creditors of the property within the state of a foreign corporation, all of whose property has been previously transferred in the state of its incorporation to a statutory successor for the benefit of creditors. *Clark v. Williard*, *supra*; *Fischer v. American United Life Ins. Co.*, No. 91, decided this term. Due process under the Fifth Amendment, the benefits of which extend to alien friends as well as to citizens, *Russian Volunteer Fleet v. United States*, 282 U. S. 481, does not call for any different conclusion. *Disconto Gesellschaft v. Umbreit*, *supra*, 579-80.

At least since 1797, *Barclay v. Russell*, 3 Vesey, Jr., 424, 428, 433, the English courts have consistently held that foreign confiscatory decrees do not operate to transfer title to property located in England even if the decrees were so intended, whether the foreign government has or has not been recognized by the British Government. *Lecouturier v. Rey*, [1910] A. C. 262, 265. *Cf.* also *Folliott v. Ogden*, 1 H. Black. 123, 135-36, affirmed 3 T. R. 726, affirmed, 4 Brown's Cases in Parl., 111; and *Wolff v. Oxholm*, 6 M. & S. 92, both of which may have carried the doctrine of non-recognition of foreign confiscatory decrees even further. See Holdsworth, "The History of Acts of State in English Law," 41 Columbia L. Rev. 1313, 1325-26. The English courts have applied this rule in litigation arising out of the Russian decrees, holding that they are not effectual to transfer title to property situated in Great Britain. *Sedgwick Collins & Co. v. Russia Insurance Co.*, [1926] 1 K. B. 1, 15, affirmed, [1927] A. C. 95; *The Jupiter (No. 3)*, [1927] P. 122, 144-46, affirmed, [1927] P. 250, 253-55; *In re Russian Bank for Foreign Trade*, [1933] 1 Ch. 745, 767-68. The same doctrine has prevailed in the case of the Spanish confiscatory decrees, *Banco de Vizcaya v. Don Alfonso*, [1935] 1 K. B. 140, 144-45, as well as with respect to seizures by the American Alien Property Custodian. *Sutherland v. Administrator of German Property*, [1934] 1 K. B. 423; and see the decision of the British court for Hong Kong discussed in *Ingenohl v. Olsen & Co.*, *supra*, and the Privy Council's decision in *Ingenohl v. Wing On & Co.*, 44 Patents Journal 343, 359-60. In no case in which there was occasion to decide the question has recognition been thought to have subordinated the law of the forum, with respect to property situated within its territorial jurisdiction, to that of the recognized state. Never has the forum's refusal to follow foreign transfers of title to such property been considered inconsistent with the most friendly relations with the recognized foreign government, or even with an active military alliance at the time of the transfer.

It is plain that under New York law the claimants in this case, both creditors and those asserting rights of the insurance company, have enforceable rights with respect to the property located there which have been recognized though not created by the judgments of its courts. The conclusion is inescapable that had there been no assignment and this suit had been maintained by the Soviet Government subsequent to recognition, or by a private individual claiming under an assignment from it, the decision of the New York court would have presented no question reviewable here.

The only question remaining is whether the circumstances in the present case that the Russian decrees preceded recognition and that the assignment was to the United States, which here appears in the rôle of plaintiff, call for any different result. If they do, then recognition and the assignment have operated to give to the United States rights which its assignor did not have. They have compelled the state to surrender its own rules of law applicable to property within its limits, and to substitute rules of Russian law for them. A potency would thus be attributed to the recognition and assignment which is lacking to the full faith and credit clause of the Constitution. See *Clark v. Williard, supra*; *Fischer v. American United Life Ins. Co., supra*.

In deciding any federal question involved, it can make no difference to us whether New York has chosen to express its public policy by statute or merely by the common law determinations of its courts. *Erie Railroad v. Tompkins, supra*; *Skiriotes v. Florida*, 313 U. S. 69, 79; *Hebert v. Louisiana*, 272 U. S. 312, 316. The state court's repeated declaration of a policy of treating the New York branch of the insurance company as a "complete and separate organization" would permit satisfaction of whatever claims of foreign creditors, as well as those of sister states, that New York deems provable against the local fund. But if my brethren are correct in concluding that all foreign creditors must be deprived of access to the fund, it would seem to follow—since the Soviet decrees have exempted no class of creditors—that the rights of creditors in New York or in sister states, or any other rights in the property recognized by New York law, must equally be ousted by virtue of the extraterritorial effect given to the decrees by the present decision. For statutory priorities of New York policyholders or New York lienholders, and the common law priorities and system of distribution which the judgment below endeavored to effectuate and preserve intact, must alike yield to the superior force said to have been imparted to the Soviet decrees by the recognition and assignment. Nothing in the Litvinov assignment or in the negotiations for recognition suggests an intention to impose upon the states discriminations between New York and other creditors which would sustain the former's liens while obliterating those of the latter. If the Litvinov assignment overrides state policies which protect foreign creditors, it can hardly be thought to do less to domestic creditors, whether of New York or a sister state.

I assume for present purposes that these sweeping alterations of the rights

of states and of persons could be achieved by treaty or even executive agreement, although we are referred to no authority which would sustain such an exercise of power as is said to have been exerted here by mere assignment unratified by the Senate. It is true that in according recognition and in establishing friendly relations with a foreign country this Government speaks for all the forty-eight states. But it was never true that recognition alters the substantive law of any state or prescribes uniform state law for the nationals of the recognized country. On the contrary it does not even secure for them equality of treatment in the several states or equal treatment with citizens in any state save as the Constitution demands it. *Patson v. Pennsylvania*, 232 U. S. 138; *Terrace v. Thompson*, 263 U. S. 197; *Clarke v. Deckebach*, 274 U. S. 392 and cases cited. Those are ends which can be achieved only by the assumption of some form of obligation expressed or fairly to be inferred from its words.

Recognition, like treaty making, is a political act and both may be upon terms and conditions. But that fact no more forecloses this court, where it is called upon to adjudicate private rights, from inquiry as to what those terms and conditions are than it precludes, in like circumstances, a court's ascertaining the true scope and meaning of a treaty. Of course the national power may by appropriate constitutional means override the power of states and the rights of individuals. But without collision between them there is no such loss of power or impairment of rights, and it cannot be known whether state law and private rights collide with political acts expressed in treaties or executive agreements until their respective boundaries are defined.

It would seem therefore that in deciding this case some inquiry should have been made to ascertain what public policy or binding rule of conduct with respect to state power and individual rights has been proclaimed by the recognition of the Soviet Government and the assignment of its claims to the United States. The mere act of recognition and the bare transfer of the claims of the Soviet Government to the United States can of themselves hardly be taken to have any such effect, and they can be regarded as intended to do so only if that purpose is made evident by their terms, read in the light of diplomatic exchanges between the two countries and of the surrounding circumstances. Even when courts deal with the language of diplomacy, some foundation must be laid for inferring an obligation where previously there was none, and some expression must be found in the conduct of foreign relations which fairly indicates an intention to assume it. Otherwise courts rather than the executive may shape and define foreign policy which the executive has not adopted.

We are not pointed to anything on the face of the documents or in the diplomatic correspondence which even suggests that the United States was to be placed in a better position with respect to the claim which it now asserts, than was the Soviet Government and nationals. Nor is there any intimation in them that recognition was to give to prior public acts of the Soviet

Government any greater extraterritorial effect than attaches to such acts occurring after recognition—acts which by the common understanding of English and American courts are ordinarily deemed to be without extraterritorial force, and which in any event have never before been considered to restrict the power of the states to apply their own rules of law to foreign owned property within their territory. As we decided in *Guaranty Trust Co. v. United States*, *supra*, 143, and as the opinion of the court now appears to concede, there is nothing in any of the relevant documents “to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the [New York] debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law.”

Recognition opens our courts to the recognized government and its nationals, see *Guaranty Trust Co. v. United States*, *supra*, 140. It accepts the acts of that government within its own territory as the acts of the sovereign, including its acts as a *de facto* government before recognition, see *Underhill v. Hernandez*, *supra*; *Oetjen v. Central Leather Co.*, *supra*; *Ricaud v. American Metal Co.*, *supra*. But until now recognition of a foreign government by this Government has never been thought to serve as a full faith and credit clause compelling obedience here to the laws and public acts of the recognized government with respect to property and transactions in this country. One could as well argue that by the Soviet Government's recognition of our own Government, which accompanied the transactions now under consideration, it had undertaken to apply in Russia the New York law applicable to Russian property in New York. Cf. *Ingenohl v. Olsen & Co.*, *supra*; *Pacific Ins. Co. v. Comm'n*, 306 U. S. 493, 501-02.

In *Guaranty Trust Co. v. United States*, *supra*, this court unanimously rejected the contention that the recognition of the Soviet Government operated to curtail or impair rights derived from the application of state laws and policy within the state's own territory. It was argued by the Government that recognition operated retroactively for the period of the *de facto* government to set aside rights acquired in the United States in consequence of this Government's prior recognition of the Russian Provisional Government. This argument we said, page 140, “ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a *de facto* government which by virtue of the recognition, has become a government *de jure*. But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own Government.” Even though the two govern-

ments might have stipulated for alteration by this Government of its municipal law, and the consequent surrender of the rights of individuals, the substance of the court's decision was that such an abdication of domestic law and policy is not a necessary or customary incident of recognition or fairly to be inferred from it. No more can recognition be said to imply a deprivation of the constitutional rights of states of the Union, and of individuals arising out of their laws and policy, which are binding on the Federal Government except as the act of recognition is accompanied by some affirmative exercise of federal power which purports to set them aside.

Nor can I find in the surrounding circumstances or in the history of the diplomatic relations of the two countries any basis for saying that there was any policy of either to give a different or larger effect to recognition and the assignment than would ordinarily attach to them. It is significant that the account of the negotiations published by the State Department (*Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics*, Eastern European Series No. 1), and the report of subsequent negotiations for adjustment of the claims of the two countries submitted to Congress by the Secretary of State (H. Rep. No. 865, 76th Cong., 1st Sess.) give no intimation of such a policy. Even the diplomatic correspondence between the two countries of January 7, 1937, to which the opinion of the court refers, and which occurred long after the United States had entered the Moscow Fire Insurance Company litigation, merely repeated the language of the assignment without suggesting that its purpose had been to override applicable state law.

That the assignment after recognition had wide scope for application without reading into it any attempt to set aside our local laws and rights accruing under them is evident. It was not limited in its application to property alleged to be confiscated under the Soviet decrees. Included in the assignment by its terms were all "amounts admitted to be due or that may be found to be due it [the Soviet Government], as the successor of prior Governments of Russia, or otherwise, from American nationals." It included claims of the prior governments of Russia, not arising out of confiscatory decrees, and also claims like that of the Russian Volunteer Fleet, growing out of our own expropriation during the war of the property of Russian nationals. The assignment was far from an idle ceremony if treated as transferring only the rights which it purports to assign. Large sums of money have already been collected under it and other amounts are in process of collection without overturning the law of the states where the claims have been asserted.¹

At the time of the assignment it was not known what position the courts

¹ By June 30, 1938, the sums collected by virtue of the Litvinov assignment amounted to \$1,706,443. *Report of the Attorney General for 1938*, p. 122. Other claims are apparently still in litigation. See the *Report for 1939*, p. 99; also H. Rep. No. 865, 76th Cong., 1st Sess., p. 2.

of this country would take with respect to property here, claimed to have been confiscated by the Soviet decrees. But it must have been known to the two governments that the English courts, notwithstanding British recognition of the Soviet Government, had refused to apply the Soviet decrees as affecting property located in England. *Sedgwick Collins & Co. v. Russia Insurance Co. supra*; *The Jupiter (No. 3), supra*; *In re Russian Bank for Foreign Trade, supra*. It must also have been known that the similar views expressed by the New York courts before recognition with respect to property situated in New York raised at least a strong possibility that mere recognition would not alter the result in that state. *Sokoloff v. National City Bank*, 239 N. Y. 158, 167-69; *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 257; *Joint Stock Co. v. National City Bank*, 240 N. Y. 368; *Petrogradsky M. K. Bank v. National City Bank*, 253 N. Y. 23, 29. The assignment plainly contemplated that this, like every other question affecting liability, was to be litigated in the courts of this country, since the assignment only purported to assign amounts admitted to be due or "that may be found to be due." It was only in the courts where the debtor or the property was located that the amounts assigned would normally be "found to be due." *Cf. United States v. Bank of New York, supra*.

By transferring claims of every kind, against American nationals, to the United States and leaving to it their collection, the parties necessarily remitted to the courts of this country the determination of the amounts due upon this Government's undertaking to report the amounts collected as "preparatory to a final settlement of the claims and counterclaims" asserted by the two governments. They thus ended the necessity of diplomatic discussion of the validity of the claims, and so removed a probable source of friction between the two countries. In all this I can find no hint that the rules of decision in American courts were not to be those afforded by the law customarily applied in those courts. But if it was the purpose of either government to override local law and policy of the states and to prescribe a different rule of decision from that hitherto recognized by any court, it would seem to have been both natural and needful to have expressed it in some form of undertaking indicating such an intention. The only obligation to be found in the assignment and its acknowledgment by the President is that of the United States, already mentioned, to report the amounts collected. This can hardly be said to be an undertaking to strike down valid defenses to the assigned claims. Treaties, to say nothing of executive agreements and assignments which are mere transfers of rights, have hitherto been construed not to override state law or policy unless it is reasonably evident from their language that such was the intention. *Guaranty Trust Co. v. United States, supra*, 143; *Todok v. Union State Bank*, 281 U. S. 449, 454; *Rocca v. Thompson*, 223 U. S. 317, 329-34; *Disconto Gesellschaft v. Umbreit, supra*, 582; *Pearl Assur. Co. v. Harrington*, 38 F. Supp. 411, 413-14, affirmed, 313 U. S. 549; *Patsone v. Pennsylvania*, 232 U. S. 138, 145-46; *cf. Liverpool Ins. Co.*

v. Massachusetts, 10 Wall. 566, 568, 576-77. The practical consequences of the present decision would seem to be, in every case of recognition of a foreign government, to foist upon the executive the responsibility for subordinating domestic to foreign law in conflicts cases, whether intended or not, unless such a purpose is affirmatively disclaimed.

Under our dual system of government there are many circumstances in which the legislative and executive branches of the national government may, by affirmative action expressing its policy, enlarge the exercise of federal authority and thus diminish the power which otherwise might be exercised by the states. It is indispensable to the orderly administration of the system that such alteration of powers and the consequent impairment of state and private rights should not turn on conceptions of policy which, if ever entertained by the only branch of the government authorized to adopt it, has been left unexpressed. It is not for this court to adopt policy, the making of which has been by the Constitution committed to other branches of the government. It is not its function to supply a policy where none has been declared or defined and none can be inferred.

Mr. Justice ROBERTS joins in this opinion.

BOOK REVIEWS AND NOTES

Papers Relating to the Foreign Relations of the United States, 1926. Washington: Government Printing Office, 1941. Vol. I, pp. cxxvii, 1126. Index. \$2.00. Vol. II, pp. xcii, 1023. Index. \$2.00.

Papers Relating to the Foreign Relations of the United States, General Index, 1900-1918. Washington: Government Printing Office, 1941. pp. iv, 507. \$1.25.

Far removed from the events of the present war period seems the year 1926, when President Coolidge told Congress in his annual message that the state of the Union was "one of general peace and prosperity," and when the total appropriation for the armed forces for twelve months was but 680 millions of dollars. The carefully edited volumes of diplomatic correspondence for 1926 contain some statements which seem anticipatory of problems which were to come. There was, for example, a reported feeling in Japan that United States naval authorities had developed a radio project in China with a view to possible war with the Japanese (I, 1044), an assertion by a British Foreign Office spokesman that the peace of the world could be effectually preserved whenever England and America agreed to insist that it be kept (II, 248), and a suggestion in a memorandum from the Department of State that in war a vigorous offense is the best defense (I, 96). Much of the now published material has to do with such matters as the Tacna-Arica problem, and the civil strife in China in its effect upon American rights and interests. Some questions still remained from the World War of 1914-1918. Proposed plans for disarmament, and American entry into membership in the Permanent Court of International Justice, were under discussion. Illuminating information is provided concerning policy as to American claims against Great Britain for alleged violations of neutral rights during the period before April 6, 1917 (negotiations which were to culminate in the executive agreement of May 19, 1927, on this subject matter).

Among the questions of technical law touched upon in the diplomatic records for the year are the non-confiscation of private enemy property (I, xxv), the scope of diplomatic immunities (I, 548-552), recognition of governments as *de facto* authorities (I, 667, 672), non-recognition as affecting the situation of the American diplomatic representative in China as toward the Soviet envoy who was dean of the diplomatic corps (I, 1098), a state's right of interposition in behalf of its nationals having an interest in a foreign corporation whose property is taken or destroyed by public action (II, 166-194, 283, 285, 314, 318, 325, 332-334), legal liability of a state to aliens for what would today be called a "scorched earth" policy in war (II, 328), jurisdictional immunities in Japan of United States Shipping Board vessels (II, 482, 486), and the possibility of an individual's precluding his own state from invoking international law in his behalf (II, 615, 623). In the matters of form, prepa-

ration and arrangement, the volumes for 1926 maintain the high standard which the State Department's Division of Research and Publication had previously set.

The *General Index, 1900-1918*, has become available partly in response to the need emphasized by a committee of the American Society of International Law. It is a subject index, covering twenty-four volumes issued during the present century, but not covering the special volumes for the years 1914-1918 dealing with the World War and the Russian Revolution. The inclusiveness of the index, and its well-planned system of cross-references, enhance its value to students. Supplementing the *General Index* for the material from 1861 through 1899 (which was published in 1902), it affords to investigators in the field of American diplomacy and international law an additional guide of great usefulness.

ROBERT R. WILSON

Post-War Worlds. By P. E. Corbett. Institute of Pacific Relations Inquiry Series. New York: Institute of Pacific Relations, 1942. pp. xvi, 211. Bibliography. Index. \$2.00.

The only indication of a connection between this admirable book and the series of which it is a part is the fact of inclusion and a brief chapter on "Peace in the Pacific." Written in universal terms, and dealing with cosmic principles and problems, the volume might well stand alone as an introduction to the great task of post-war organization, or as a first book on world organization, to be followed by more detailed studies of the several subjects which Dr. Corbett has discussed on the basis of general principles. The result is the best book now known to the reviewer on the difficult problems which will face the nations of the world at any peace conference charged with the task of reorganizing the great international society.

The displacement of world peace by world anarchy is charted in broad terms. The noble but futile effort of the 'twenties to maintain the peace is described with sympathy, but also with realism. Grand designs of peace, old as the hills, are infused with the flesh and blood of present-day need and demand. The rise of federalism as a basis of world organization is sketched, without the fervor of Lionel Curtis or the sentiment and fancy of Clarence Streit. As a Canadian friendly to Pan American peace organization, Mr. Corbett sheds light on a states system weak in organization, poor in resources, but rich in results. Breaking the Pacific system of states into its fundamentals, this zone of world power (with half the world's territory and people) is analyzed, not as an isolated region, but as a part of the general world order, which it always has been, and will always be. The order of the Axis and its world consequences are briefly charted, without the tiresome observations on Nazi ideology which constitute nine-tenths of the material of books on Germany today. The British-American collaboration, in purpose, direction, and procedure, is presented in the light of its pragmatic contribution to world society rather than from any ties of blood, culture, or language. The defects

of international law as a system of jurisprudence, and of the family of nations as a law-abiding and law-enforcing society are indicated with frankness, but without surrender to those who deny both the law and the order. The legal concept of sovereignty and the political creed of nationalism are conjoined in a delightful chapter which avoids both legal jargon and political effusion. Resolution of the conflict between the free and power economies is suggested in a chapter entitled "Economic and Financial Organization." Rejecting the overdone term "international," the author employs the term "supranational" in setting forth the place of police, courts, legislation and administration in the world order that is to be. Colonies and mandates are given attention with a view to realistic administration rather than to logical integration within an international system. Finally the magic but hackneyed title "World Order" is given to a concluding chapter. The discussion, however, is quite original, and contains as complete and as practical a set of international institutions and processes for the building of peace as we find in present-day books.

The faults of the book lie in the fields of the universals and imponderables. For one thing, Dr. Corbett has written in such general terms that one views only the broad lines of international thought and action. For another, one views perhaps too much reliance on recent experience, which does not today carry too much conviction. Moreover, one might well conclude that Dr. Corbett magnifies the possible effects of democratic and peaceful forces in world organization, and tends to minify the possible consequences of totalitarian and aggressive forces in the world. However, the author, by implication, if not expressly, assumes that there cannot be a world order in case of a totalitarian victory. It seems that one must take one road or the other, and follow it through to the end, wherever it may lead.

This is a book for the expert on the principles and practice of our international system, written so that the layman may understand it. It is a striking exception to the rule of so many books on international law being consigned to the dust of the library shelves. Had our profession written as soundly, as clearly, and with as much interest as Dr. Corbett, the world might have been well informed of the principles and facts which it must now master through "blood, sweat and tears."

CHARLES E. MARTIN

The Philippines: A Study in National Development. By Joseph Ralston Hayden. New York: Macmillan Co., 1942. pp. xxviii, 984. Illustrations. Maps. Index. \$9.00.

This work by a professor of political science at the University of Michigan, who was also Vice-Governor of the Philippine Islands from 1933 to 1935, will take its place beside authoritative and scholarly works like that of James B. Leroy and W. Cameron Forbes, by writers who have had intimate and responsible service in the Philippine Islands during the period of American sovereignty. The scope of the book is particularly useful at the present time

because it is devoted primarily to the period since the passage of the Congressional enabling act and the promulgation of the Philippine Constitution of 1935. There is no phase of politics and no important detail of government within the newly created Philippine Commonwealth that Professor Hayden does not thoroughly and accurately describe. His judgments are very favorable to the Filipino leaders and to the Philippine achievement under the quasi-independent system that has existed during these years. That genuine liking for the Filipino people of all classes and grades, and an optimistic expectation of their success, which are the characteristics of nearly all Americans who have ever lived and worked in the Philippines, is very manifest in the attitude and treatment of the author.

The work deals with the actual situation in the Philippines and with the political and economic problems which confront the Filipinos; while, properly enough in a study of this kind, the historical background is treated as briefly as is consistent with an understanding of immediate matters. This is particularly true when the author reaches a discussion, in Parts IV and V, of External Relations. The Philippine Islands, for a very long while — in fact, since their discovery by Magellan, have been an object of international cupidity and rivalry. The outlying portions of the archipelago feebly held by Spain were repeatedly the objects of desire by British, French, German, and Japanese foreign statesmanship down to the end of the Spanish period and even in the last forty years. No writings that adequately treat this side of the importance of the Philippines have been published, although a Filipino student, Dr. Manuel Cases, has recently, in a work still in manuscript, covered this ground and revealed some matters hitherto secret, probably unknown even to our own State Department.

So the author's treatment of external relations is confined to four rather brief chapters: one dealing with the Chinese and Japanese in the Islands; another, quite brief but probably containing as much as military policy would desire to divulge, on National Defense; a third on the present and probable future relations between the United States and the Philippines, which, in an interesting and important manner, discusses the position in the Islands of the United States High Commissioner; and, finally, a chapter on "A New Vocabulary," in which the author's conclusions are summarized as follows: first, "that the Philippines has become a nation, and while it is not yet an entirely independent one, it must be dealt with as such"; second, that despite the remarkable accomplishment of the past four decades, the Philippines still need the protection and economic support of the United States. These conclusions leave the dilemma just about where it has been for many years, and although the author states his view that "the Philippines cannot afford to risk national destruction out of deference to immediate independence," he thinks America should not be "bound by a possibly inapplicable interpretation" of the dogma that there is no responsibility without authority. This last, however, would seem to be the situation created for their country by the

authors of the Tydings-Cumming Act, and it is impossible to say whether or not the American people will desire or tolerate the continuance of the present indefinite status if its sovereignty survives the present intense belligerency that involves the Islands.

DAVID PRESCOTT BARROWS

Treaties and Constitutional Law: Property Interference and Due Process of Law. By Willard Bunce Cowles. Washington: American Council on Public Affairs, 1941. pp. xvi, 315. Index. Cloth, \$4.50; paper, \$3.50.

The author of this illuminating work has had experience in the Department of State and in the Department of Justice, and was the winner last year of the American Bar Association \$3,000 prize for his essay on the effect of the Monroe Doctrine in International Law. His present book is, to some extent, a pioneer in its field. It deals with the interesting, though limited, question of how far a provision of a treaty of the United States which contains a provision violative of the due process or just compensation clauses of the Fifth Amendment of the Federal Constitution, so far as it relates to property, can or will be enforced in our courts. In the famous British Debts case of *Ware v. Hylton* in 1796, the United States Supreme Court held that the treaty involved must prevail as against property rights which had vested under a State statute and that the latter was invalid if in conflict with the treaty. The author criticises this case and agrees with what he terms the dissenting opinion of Justice Iredell (which was in fact not a dissenting opinion, since he forbore to take any part in the action of the court and simply read to the court his opinion in the Circuit Court). The author then comprehensively surveys and interestingly discusses all subsequent treaty cases of this type in the federal courts, even down to the Litvinoff assignment series of cases ending with the decision of *United States v. Pink* on February 2, 1942. He reaches the conclusion that none of them have followed the actual decision of *Ware v. Hylton* (though some of them affirm a few of its *dicta*). He points out impressively that the power to make a treaty must not be confused with the power to enforce it domestically in the courts; that the doctrine of judicial review when appropriately presented in a litigated case has been applied to treaty cases; that the treaty-making power is limited domestically by the Fifth Amendment; and that the courts have declined to enforce treaty provisions as against a property owner asserting in court his vested property rights (though, as in case of domestic statutory legislation, interpretation of a treaty may result in a finding that its property provisions did not violate due process). If the court finds such a violation, however, whether in the treaty itself or in any necessary implementing legislation, its provisions will not be enforced in a federal court. The author points out, by the way, the little known fact that Chief Justice Taney's decision in the *Dred Scott* case holding the Missouri Compromise Act unconstitutional was in part based on the fact that that statute was an invalid implementation of the Louisiana Purchase Treaty. The refusal of a

court to enforce an invalid provision of a treaty or of an implementing Act of Congress does not necessarily leave the treaty entirely ineffective. Its enforcement can be brought about, in many cases, in another fashion by Congressional legislation providing for just and adequate compensation to the party whose property rights have been infringed. The duty and power rests upon Congress to enforce the treaty if it can be done in a Constitutional manner. If it cannot be so done, the treaty itself, nevertheless, remains still valid and the United States must take the international consequences for failing to comply with its provisions.

It may be noted that the author treats only of the due process clause as applied to property, in which case the interference with an individual's rights can generally be cured by Congressional action duly compensating him for any violation of his rights. It would be interesting to consider how far the author's discussion would be applicable to a case of a treaty violating due process as to his "liberty" under the same amendment, in which case probably no Congressional action could ever cure such a treaty violation.

CHARLES WARREN

Bollettino del Tribunale delle Prede. Published under supervision of Professor R. Sandiford. Rome: Ministero della Marina, 1941. Pt. I, pp. 197; Pt. II, pp. 84; Pt. III, pp. 34; Pt. IV, pp. 19. Indices.

The new Italian periodical whose first issue is here under review is devoted to the practice of the Italian Prize Court during the present war. The present volume consists of four divisions. Part I contains a collection of the Italian statutes particularly applicable in prize proceedings, namely, the Law of War and the Law of Neutrality, both put in force by royal decree of July, 1938, the statute regulating the procedure before the Prize Court approved by royal decree of September 5, 1938, and a number of various decrees and ordinances issued either in pursuance of or for the modification of these statutes. Part II contains ten decisions of the Italian Prize Court, rendered during June and July of 1941. Part III gives an Italian translation and the German original of the German Prize Ordinance of August 28, 1939. Finally Part IV reprints two Italian prize decisions of the last World War, namely, the cases of the steamer *Kyzicos* and of the Greek boats *Aghios Spiridion* and other vessels (known to the American reader from the late Professor Garner's book).

It is certainly not possible to discuss within the framework of this review all the issues decided in the ten prize cases reported. The first and longest one, the case of the steamer *Polinnia*, is probably the most interesting one from a more general point of view, for it deals with the general nature of prize proceedings and their procedural characteristics. According to the Italian conception, prize proceedings are a procedure *sui generis* in which the state is the party plaintiff and in which persons claiming rights in the captured goods or vessels may assume the part of parties defendant. There-

fore, among other things, the adversary method of submitting proof is not always and necessarily followed. Furthermore, the question of who is a proper party defendant presents a number of legal difficulties with which the court had to deal in the instant case. In connection with this matter, it may be mentioned that in two cases regarding goods taken on board the steamer *Beatrice C.* the court held that, for the purpose of the prize proceedings, the embassy of the United States in Italy, which had assumed the protection of the interests of the British subjects in Italy, could not validly represent, or appoint an attorney for, the British firms which claimed a right in the captured goods, since Britain herself could not have done so.

Of course, the cases present a great many other points of interest. To persons who wish to be familiar with the prize law as applied during the present war, the periodical—if it should be continued—will certainly be of valuable assistance.

STEFAN A. RIESENFELD

International Rivalry in the Pacific Islands, 1800-1875. By Jean Ingram Brookes. Berkeley and Los Angeles: University of California Press, 1941. pp. x, 454. Bibliography. Index. \$5.00.

This is a timely volume. In sixteen chapters it presents a comprehensive treatment of a period of the development and partitioning of Oceania and the establishment of protectorates there to 1875. It should prove helpful in aiding an understanding of more recent tendencies and rivalries and vital relationships in the Pacific Island area. The study begins with a brief chapter on "An-All-British Australia" where the first establishment of a British colony is designated as the first concrete evidence of a competitive relationship of the maritime Powers toward Oceania, and where the British early reached a significant decision to avoid partitioning with other Powers (and especially with the French). Here, in this recruiting station for whalers and traders and missionaries and in local developments of political views in regard to the future of the island world, originated many of the most permanent of the forces which combined to direct British influence and British interests and later British responsibilities in the Pacific islands. After Australia, the volume treats chronologically, usually by decades, the evolution of increasing interest in the islands through expanding activities of traders and whalers and missionaries, and the resulting rivalries which created important international problems first in New Zealand, the Marquesas, Tahiti, Hawaii, and New Caledonia, and later in Samoa, Fiji and Hawaii. It omits islands near the Asiatic coast, such as Singapore and Sumatra.

The indifferent policy of the British Government to extend its authority over the islands is prominent throughout the volume. It was illustrated especially by early disclaimers of British sovereignty over New Zealand (in 1824). It was later modified by the practical annexation arguments of the Australians and by the necessities arising from increasing French interests and designs in the islands. In 1839 the earlier amorphous ideas concerning

the problem of control in New Zealand were abandoned in the decision to establish British authority there, but the indifference was continued in a policy of non-interference against the French establishment of a protectorate at Tahiti in the eastern Pacific in 1842 and the French occupation of strategically important New Caledonia in the Western Pacific in 1853. The British Government still ignored the Australian advice and arguments for annexation of other islands such as the Friendly, the Fiji, New Hebrides, New Guinea and the Celebes to offset the French occupation of New Caledonia. However, in 1874, after a long discussion of policy, it reversed its decision concerning the Fiji group. Acting upon a "concurrence of circumstances" (including the pressing advice of the Australian colonies who complained of British indifference to Australian interests), it finally yielded to the continued efforts of the Fijis to secure British protection and accepted the offer of an unconditional cession of the group, involving new responsibilities of British political control and new imperial financial costs in which Australia did not share.

The value of the volume is enhanced by notes (including extensive references to sources) at the close of each chapter, and also by a separate bibliography of manuscript and published sources (both official and unofficial) and of secondary published materials. The use of the volume is facilitated by a satisfactory index and by a map of Oceania. J. M. CALLAHAN

Le Refuge du Gouvernement National à l'Etranger. By Andrée Jumeau. Aix-en-Provence, France; Editions Paul Roubaud, 1941. pp. 173. Index. 30 French francs.

This book on the refuge of national governments in exile, published in the summer of 1941 in unoccupied France, deals with questions which arose during World War I. The first chapters consider the consequences of a *debellatio*, i.e., the complete subjugation of a conquered territory; especially the non-recognition of military conquest is fully discussed. The sovereignty of governments-in-exile makes their regular activity possible. Independent from the loss of power within the national territory, coöperation with allied forces prevails in military and colonial matters. The second part of the book is devoted to the historical precedents of World War I. The activity of the Belgian Government in Sainte-Adresse, France, and of the Serbian in Corfu, Greece, is treated in detail as is that of the Polish National Committee and of the Czechoslovak National Council. These committees, both originally founded by individuals, were eventually recognized as official organizations and later as delegations from the governments of states to be created by the peace treaties. Finally, the author refers to the activity of the Montenegrin Government in Neuilly, France, the Provisional Venizelos Government in Salonica, Greece, and the National Council of Roumanian Unity in Paris.

Similar events in this war are not and could not be dealt with, since foreign legal documents were unavailable in France after its defeat in June, 1940.

For the same reason the author could use but few references other than French. New questions of international law emerging in the course of the present conflict and dealing with the activity of numerous governments-in-exile are dependent on the character of actual economic warfare. The various decrees of the governments-in-exile, of which translations have partly been published by the Circulars of the Federal Reserve Bank of New York, are intended to secure the national assets outside the occupied territory in order to prevent any unlawful use by the invader. Not only constitutional questions arise, but also the trading with the enemy acts of the respective countries create new conflicts. Claims of the Belgian and Polish National Banks, *f.i.*, arising from gold deposits with the *Banque de France*, involve the governments-in-exile too, which want the assets abroad to be preserved. The application of legislative measures of governments-in-exile has until now been considered in a few judicial decisions only—*e.g.*, in this country in *Anderson v. N. V. Transandine Handelsmaatschappij*, 28 N.Y.S. (2d) 547, *aff'd*. 263 App. Div. 705 (1941), 263 App. Div. 858 (1942), concerning the vesting of claims of Dutch Nationals in occupied territory in the Dutch Government-in-exile. Another question, the conscription of Dutch nationals, has been dealt with both by English and Canadian courts: (*In re Amand*, [1941] 2 K.B. 239), and (1942) 193 L.T.J. 70; *Re de Bruijn*, *Re de Romeijn*-*sen* (1942) 1 D.L.R. 249.

Although restricted to the historical precedents of the First World War, this French publication contributes valuable documentation to the more complicated legal questions arising out of the activity of governments-in-exile in this war.

MARTIN DOMKE

The Expropriation of Foreign-Owned Property in Mexico. By Wendell C. Gordon. Washington: American Council on Public Affairs, 1941. pp. x, 201. Cloth, \$3.25; paper, \$2.50.

La Expropiación en el Derecho Mexicano. El Caso del Petróleo. By Juan Botella Asensi. Mexico: Editorial Moderna, 1941. pp. 217. Index.

The two books under review are recent additions to the growing literature, both in English and in Spanish, on Mexican expropriations. Different as they are as to their method of approach and as to the personality of their authors—the first being written by an American economist, the second by a Spanish jurist, a former Minister of Justice of the Spanish Republic—both books are distinguished by their non-political, but scholarly, objective and impartial attitude.

Gordon, considering the expropriations as the principal problem of Mexico's international relations, gives a careful historical and economic survey of the railroad problem, of the land problem from the Spanish conquest to the end of the Diaz dictatorship; of the economic development of the land reform from the beginning of the Mexican Revolution to Cárdenas, of the development of the oil industry, the economic aspects of the oil problem and of the

attempts at settlement since 1938. Basing his study on a full use of all available materials, he is cautious in his critique of the land reform: it is, according to him, an experiment; more time must elapse before an answer can be given as to whether it has been a success. With equal caution he reserves judgment for the future on Mexico's handling of the oil industry since 1938. Gordon believes—correctly in this reviewer's opinion—that there is no probability of further expropriations, *e.g.*, with regard to the mining industry where Americans control 60, or of public utilities in the near future. As reasons he gives the experienced difficulties in operating the railroads and the oil industry, Mexico's need of further foreign capital and the conservative tendencies of the present President. But Gordon takes also the legal angle into consideration. He gives a review of the municipal law controlling the land reform since 1910, of the legal status of the oil industry under Mexican law and of the oil expropriation. But here he gives only a review, not an investigation. He fails to treat the real legal problem, namely, to show in how far the expropriation is or is not in accordance with Mexican law.

This is exactly the problem of the Spanish book. The Spanish author restricts himself to a strictly legal analysis of the legality of the oil expropriation under Mexican municipal law. He agrees that under Art. 27 of the Mexican Constitution, although this article undoubtedly has primarily the expropriation of land in view, other classes of goods also can constitutionally be expropriated. He holds—and here we cannot follow him—that under Mexican law there was and is no right of property in the subsoil oil. He agrees with the Mexican conception of "public utility." But he comes to the objective and important conclusion that the Expropriation Law of 1936 violates the Constitution of 1917 in two important points: first, in establishing an administrative procedure for expropriation in violation of Art. 27, Sec. VIII, of the Constitution, which clearly provides that the exercise of the right of expropriation "*se hará efectivo por el procedimiento judicial*"; second, in allowing the indemnity to be paid in ten years after the expropriation, equally a violation of Art. 27; for this article provides that expropriation can take place only "*mediante indemnización*." This, it is true, changes the prescription of *previous* indemnity, as prescribed by the former Mexican Constitution, but contains the norm, as recognized by judgments of the Mexican Supreme Court, that expropriation and payment of indemnity must be made at the *same* time.

And such violations of Mexican law are, of course, also important under international law. The international aspect is equally dealt with by Gordon, and he arrives at the correct conclusion that Mexico, under international law, "is clearly bound to compensate the oil companies for their properties, including the subsoil." But his chapters on land and oil expropriations under international law are not very profound and lack the character of real legal research into this problem. It is not necessary to go here into details. (This reviewer may refer to his study "Mexican Expropriations," *Contempo-*

rary Law Pamphlets, Series 5, Number 1, pp. 64, New York University, 1940.) The Spaniard touches only the problem of international law in a few pages, but shows himself again as a jurist. While greatly sympathizing with Mexico's reliance on the Calvo Doctrine, he clearly and correctly states that no doctrine, as to what the law should be, however generous, can be opposed in a legal conflict to the norms of positive international law.

JOSEF L. KUNZ

War as a Social Institution: The Historian's Perspective. Edited for the American Historical Association by Jesse D. Clarkson and Thomas C. Cochran. New York: Columbia University Press, 1941. pp. xviii, 333. Index. \$3.50.

This volume is the fourth symposium on war which has come to the reviewer's attention during the past two years. It contains a selection of the papers delivered at the meeting of the American Historical Association in December, 1940, on "War and Society." Though published three months before the attack on Pearl Harbor, many of the authors considered it improbable that the United States would keep out of the war. The 27 articles with connecting introductions by the editors, deal with psychological, economic and historical causes of war, with the technical and strategic changes in war, with the impact of war on society and economy, and with neutrality and American foreign policy. The picture is one of human society increasing in area and complexity and of war functioning up to a point as an agency of integration and beyond that point as an agency of disintegration. Several of the writers reflect the broad sweep of recent studies in anthropology and comparative history. In the most recent period, war has stimulated technological progress and government planning. Before World War I it spread European technologies over the world; reduced the size of the world measured in terms of travel, transport and communication time; and made each part of the world economically and culturally dependent on the others. Since 1914, wars have exaggerated nationalisms, wrecked economies, and disintegrated cultures. They have rendered neutrality obsolete, and have made the preservation of freedom and democracy dependent upon the capacity of leading nations to organize political stability on a world-wide basis. The four concluding papers deal with American policy and approach their subject from the points of view of democratic ideals, of Latin American relations, of American traditions, and of international coöperation. These papers all emphasize the mistakes made in American policy during the 1920's because of isolationist tendencies in public opinion. This emphasis is supported by two writers on recent policies in the Scandinavian countries. All agree that national self-sufficiency and neutrality cannot survive in the modern world. These conclusions have important implications for international law. The technical aspects of that subject, however, are not dealt with in any of the articles. Though brief, many of these

papers embody the results of important researches and throw new light on special topics, such as historical opinion upon the treaties of 1919, the influence of "times of trouble" upon historical writing, the difference between democratic dictators established to meet emergencies and despotic dictators established to find an escape from military disasters, the influence on war of railways and other inventions, and the reciprocal influences of war and economy in western Europe, Russia and Japan. Students of contemporary world problems cannot afford to overlook this well indexed volume.

QUINCY WRIGHT

Arbitration in Action. By Frances Kellor. New York and London: Harper & Bros., 1941. pp. x, 412. Annexes. Table of Cases. Index. \$3.50.

This volume, prepared by the Executive Vice President of the American Arbitration Association, with legal references and annotations by Dr. Walter J. Derenberg, "deals only with the arbitration of economic disputes under commercial or civil contracts or labor agreements, entered into voluntarily by their signatories." Common law arbitrations are not dealt with in the text as the "hazards are so great that it is not recommended that arbitrations be held under any but statutory law." The discussion, therefore, is practically limited to the treatment of arbitration under State and Federal statutes, the provisions of which constitute the legal foundation of the proceeding and the legal security of the parties. Part I covers in considerable detail the general procedure in such private arbitrations. Part II, on special procedures, contains a chapter on "Settlement of Inter-American Commercial Disputes," that is, disputes arising between businessmen of the different American Republics. The system is the result of coöperation between the American Arbitration Association and the Pan American Union.

The Seventh International American Conference passed a resolution authorizing the establishment of an inter-American commercial agency with the responsibility of establishing an inter-American system of arbitration of a private nature within the scope of local arbitration laws. The resolution also approved certain standards of procedure to be used as the basis for bringing the local laws into harmony and for strengthening the observance of arbitration agreements and awards. Under the auspices of the Pan American Union the Inter-American Commercial Arbitration Commission was organized in 1934 with a constitution and by-laws. Each republic is represented unofficially by nationals chosen by a local national committee. The functions of the Commission are administrative, and aim to facilitate the arbitration proceeding. The Commission has prepared rules of procedure to this end. Among other duties, the Commission sees to the organization of local committees in each republic to assist in the creation and administration of an arbitration tribunal with a panel of arbitrators and the promotion of needed amendments to existing laws. The local committee receives applications for arbitrations, initiates the proceedings, assists in the selection of

arbitrators, and the promotion of the arbitration subject to the local laws. In practice it has been found that inter-American disputes almost invariably lend themselves to settlement through adjustment rather than arbitration, when the situations are called to the attention of the parties through a neutral body having no interest in the outcome. Consequently, the Commission has established a procedure for adjustments through an Inter-American Business Relations Committee, which receives complaints, makes inquiries, visits the parties, and facilitates a settlement between them.

The Annexes of 118 pages include a summary of the Federal and State laws governing arbitration, prepared by Professor W. A. Sturges of Yale University; the text of the United States Arbitration Act, the New York Arbitration Law, and the Rules of Procedure for Commercial Arbitration and for Inter-American Tribunals; the standard arbitration clauses for insertion in contracts, and so forth.

L. H. WOOLSEY

Power Politics. By Georg Schwarzenberger. London: Jonathan Cape, 1941. pp. 448. Bibliographies. Index. 21s.

Whoever published a volume ten years ago on the general problems of international affairs, the forces determining them, and their possible solutions, could not fail to indicate in the title the importance of international law or the League of Nations for his subject matter. Dr. Schwarzenberger himself, together with Professor Keeton, dealt with this subject as late as 1939 under the title *Making International Law Work*. His more recent "Introduction to the Study of International Relations and Post-War Planning," however, he simply calls *Power Politics*. Yet the new title indicates a change of emphasis rather than a new approach. For the author still clings to the antithesis between power politics and rule of force, on the one hand, and community spirit and rule of law, on the other. He still believes, as now even Frederick L. Schuman does, that power politics can be abolished by political and social reform, even though he is much more skeptical with regard to the current blueprints for a new international order than most of his writing and lecturing contemporaries. In Part Three under the heading "Utopias Examined" he gives a sound and brilliant analysis of the problem of international planning in general, of the blueprints for a new international order presently under discussion, and of the possible patterns and principles upon which a new international community can be founded. The author stresses the ethical, political and social aspects of the problem as over against the legalistic solutions derived from premises of abstract reason, which prevail to such an alarming extent in contemporaneous schemes for permanent peace. The stability of the future peace depends, according to the author, upon the solution of the domestic problems with which our age is confronted. "Christian communities in which democracy and social justice have become a reality hold the key to victory and post-war reconstruction in their hands."

Part One—Power Politics—presents an interesting, though somewhat tra-

ditional survey of development, dynamics, structure and trends of international society, the nature of the national and the sovereign state, the motivations and manifestations of power politics, and the functions of international law and morality. Part Two—Power Politics in Disguise—subjects the post-Versailles attempts at solving the problem of international peace to a highly critical examination. By placing the problems of the League of Nations period, such as international arbitration, peaceful change, collective security, disarmament, economic coöperation, in the context of power politics, in which they belong, and by thus elucidating the fallacies and the ultimate collapse of the ideas and institutions of this period, the author puts his analytical faculties and political judgment to best advantage. For "the lessons to be derived from the failure of the League experiment have to be learned in full if similar mistakes and subterfuges are not to be repeated in experiments for post-war reconstruction."

The volume is extensively documented and thoroughly indexed. Each chapter is followed by a list of suggested readings. The style is smooth and avoids technical language as well as superficial popularization. The volume can therefore be warmly recommended to the general reader; for he, well-meaning but uncritical and uninformed, is most easily swayed by the pseudo-religious fervor and the pseudo-scientific pretensions of the prophets of permanent peace, and hence most urgently in need of intelligent and scholarly guidance through the bewildering maze of blueprints and panaceas. The volume would also make an excellent introductory text for classes in international relations. And our professional peace planners would do well to ponder its lessons.

HANS J. MORGENTHAU

Night over Europe: The Diplomacy of Nemesis, 1939-1940. By Frederick L. Schuman. New York: Alfred A. Knopf, 1941. pp. xv, 600. Index. \$3.50.

This book is the third in Schuman's trilogy dealing with the Nazi conquest of Europe, the others being *The Nazi Dictatorship* (1935) and *Europe on the Eve* (1939). "Taken together, these works purport to tell how and why democracy committed suicide and delivered Europe over to the mercies of the Fascist Caesars" (p. vi). This third book is, like the others, thoroughly typical of Schuman. It is brilliantly written, vigorously assured in its point of view, caustically damning in its analysis of events and of statesmen, but withal factually accurate in spite of Schuman's disclaimer of "the dispassionate calm of 'objectivity'" (p. v). Schuman proves that it is possible to write about contemporary events, and to write passionately, angrily, and even bitterly, and yet with a fine sense of historical accuracy. To be sure, he frankly acknowledges in this book certain errors in the previous books, but those were errors of judgment (for example, with respect to the nature of Nazism, p. vii; and with respect to Soviet Russia, p. 223, n.); similarly, the future course of events may well suggest some mistaken opinions and con-

clusions in this book, but the history is not likely to be seriously challenged by later more "objective" revisionists. The book is, in other words, a detailed and largely chronological account of the events of 1939-1940, with occasional earlier background tersely summarized, and continuously interspersed with Schuman's biting interpretations and conclusions. Those events are now clearer to us all and need not be reviewed here. It should be noted, however, that the account closed before the German attack on Russia and, of course, before Pearl Harbor, and these events must certainly have modified somewhat the implications and conclusions drawn by Schuman from the events he actually was able to record. At the time he wrote he was bitterly pessimistic about both Russia and the United States; while this review is being written the magnificent Russian counter-attack and the increasing American participation are going on and must give even Schuman some hope for the future. No doubt he will record this hope in another book. There are statements, views, and conclusions in this book with which the reviewer does not fully agree; but it is, on the whole, so completely accurate in its detail about the spread of Nazism, so devastatingly clear in its portrayal of our past failures with respect to the menace of international aggression (to say nothing of the Nazi menace in particular), that it should be read and kept for future reading, lest our smug complacency get the better of us again.

CLARENCE A. BERDAHL

The United States and the Independence of Latin America, 1800-1830. By Arthur Preston Whitaker. Baltimore: The Johns Hopkins Press, 1941. pp. xx, 632. Indices. \$3.75.

Very appropriately at this critical juncture in world affairs appear Professor Whitaker's lectures delivered in 1938 at Johns Hopkins University. As the author points out in his prefatory remarks, the resemblances between the period covered by his book and that in which we are now living—"the intricate interplay of ideologies, national interests and geographical concepts"—are very striking. While the analogies may easily be pressed too far, many of the issues at stake today were equally important then. The Holy Alliance was the "axis" of that age which dominated the continent of Europe, was regarded as the enemy of the democratic way of life, and threatened to recover Latin America by force of arms and of ideas. The concept of hemisphere solidarity and of hemisphere defense first took shape during the Latin American struggle for independence.

Professor Whitaker is already known to scholars through his two excellent monographs, *The Spanish American Frontier, 1783-1795*, and its sequel, *The Mississippi Question, 1795-1803*. The lectures which are the basis of the present volume constitute a natural evolution of his earlier scholarly interests. They begin with the disintegration of the system of commercial monopoly maintained by Spain and Portugal over their American empires and the consequent rise of North American trade with those areas, and close with the

Congress of Panama and the relaxation of our interest in the new South American republics which followed. The author has made excellent use of the considerable monographic literature that has accumulated in recent years, has searched the public archives of Spain and the United States and to some extent those of Argentina, Uruguay and Brazil, and has resorted to many private manuscript collections in this country. The result is the most complete synthesis so far vouchsafed us of the period in question from the standpoint of our relations with the "Latin" communities of the New World. Economic influences and political sentiment receive recognition equally with diplomatic narrative. Rivalry between the United States and Great Britain, and the conflict of interests within the United States itself, are faithfully delineated, and the origins of the Monroe Doctrine are once more reconsidered. Particularly interesting are the chapters which discuss the sources and the channels of propaganda regarding Latin America within the United States. The author's touch is perhaps less sure when referring to circumstances within the Spanish American empire itself, and the reader may sometimes disagree with him in matters of emphasis or in regard to some of the overtones in the narrative; but these are trivial criticisms of an extremely able and interesting historical study. The volume is provided, besides the conventional general index, with a very useful "Bibliographical Note," to which is added an index of authors, editors and translators cited within the body of the work.

C. H. HARING

Constitutionalism, Ancient and Modern. By Charles Howard McIlwain. Ithaca: Cornell University Press, 1940. pp. x, 162. \$2.50.

This is a valuable contribution both to the history of institutions and to the history of political and legal ideas. In its primary aspect the book is a piece of historiography, but in a deeper sense Professor McIlwain has presented an illuminating picture of the main elements of modern constitutionalism through the study of the historical backgrounds of the principal ideas that are involved in modern constitutionalism. At first glance Professor McIlwain's book seems to be an illustration of "pure history"; but upon closer examination we find that some chapters at least in this work exemplify the relationship between historical study and the inductive method of research. Thus the definition of constitutionalism is not presented in a terse formula but is made to appear as the result of a mingling of the central political and legal ideas that have been prevalent among the several nations whose institutions are most closely related to those of the United States.

One of the most interesting parts of Professor McIlwain's book is to be found in the chapters which treat of the development of constitutional theory in ancient Rome. The effort here is to demonstrate that the essence of the institutions of ancient Rome was constitutionalism in a true sense, and not absolutism. The maxim of Ulpian, *quod principi placuit legis vigorem habet*, appears very late in Roman history. It was only in the period of Justinian

ington of 1936 carried on during the period when Señor Ulloa was Peruvian Foreign Minister. The proposed settlement at Rio seems to support the author's thesis of the status quo of 1936 as a suitable basis. The other relations covered specifically are those with Colombia, Brazil, Bolivia, Chile, and Japan. In the question of Japanese immigration the author depicts clearly the dangers due to the nationalistic character of the Japanese settlements, and in the case of war between the United States and Japan he frankly states that the Japanese should be put in concentration camps. In the solution of the Leticia dispute with Colombia Dr. Ulloa declares that Colombia would have been wise to have accepted the Putumayo River rather than the Amazon as a much fairer and definitive solution; nevertheless he concedes that the settlement of this conflict was well received. In the settlement of the Tacna Arica dispute the mediation of the United States is rather critically but justly assessed. Dr. Ulloa concedes that the settlement is final and has been sincerely accepted by Peru; however, he feels that foreign nations should not conceive of Peru as being in Chilean leading-strings as a result. The study is a valuable contribution in the field of Latin American relations, written by a student of international law and diplomacy who has served with success in both foreign office and university.

GRAHAM STUART

Doctrina de Derecho Internacional Privado. By F. V. Garcia Amador y Rodríguez. (Habana: La Mercantil, 1941. pp. 126. Index.) The author, a student of Judge de Bustamante who has graciously added a brief preface, has endeavored to evaluate the systems by which at various periods the "localization of the law" (to use the author's phrase) has been effected. His approach to the problems of private international law are essentially historical and philosophic. Only the instructed reader will derive profit from the reading of these pages because a knowledge of the nature of the problems is assumed. Out of the legal experiences of various countries since the Renaissance, the author sees two systems competing for mastery, one emphasizing the personal character of law and legislation so as to affect persons beyond the confines of their political *situs*, and the other tending to restrict application to the territory within which persons and property are located. The borderline cases are dealt with under each system as exceptions. The author might be said to view the competition between these systems as a sort of "irrepressible conflict" from which he envisages a sterile result in both theory and practice. This leads to what appears to be the main theme, *viz.*, that the three-fold classification of laws as applied by de Bustamante in his celebrated Code of Private International Law (now adopted by 15 Latin American nations) offers the way out. By this system, the application of law in space is determined according to whether the law is of a private order, of a public internal order, or of a public international order. This criterion, argues the author, does not prefer one system over another, but leaves to the nature and content of each law to determine the special extent of its own application. This then is the author's contention. We do not attempt to evaluate it further than to say that the discussion is scholarly throughout. The book is timely because a wider knowledge of the advantages of the Code is essential to its further adoption by the states signatory to the Havana Convention.

ARTHUR K. KUHN

La Philosophie du Droit International en France depuis le XVI^e siècle. By Chan Nay-Chow. (Paris: Editions A. Pedone, 1941. pp. 168. Bibliog-

raphy.) This is an analysis of an evolution spread over four centuries, the phases of which are presented as characterized by the conceptions of Jean Bodin, the Abbé de Saint-Pierre, Montesquieu and Rousseau, Léon Duguit and, as compared with the latter, Louis Le Fur and Georges Scelle. The place occupied by the contribution of those French thinkers in the general history of the philosophy of international law is indicated in a comprehensive introduction. Dr. Chan Nay-Chow has achieved his purpose: objectively and concisely to expose a set of preëminent international doctrines, this from the philosophical point of view. The choice of the philosophical standpoint in such a connection suggests a vivid consciousness of realities. There is indeed no law where there is no force except in the hands of the interested parties themselves, nor can rules be considered legal by which, in the absence of courts, each party independently appreciates the extent of its obligations. Attempts at demonstrating that, as it stands, international law is *law* cannot but be misleading and noxious, entertaining among the masses a false sense of security, likely to prevent them from deploying in time the minimum of dynamism sufficient to forestall at least some wars. JOSEPH NISOT

America and Japan. Edited by William P. Maddox. (Philadelphia: Annals of the American Academy of Political and Social Science, Vol. 215, May, 1941. pp. x, 247. Map. Index. Cloth, \$2.50; paper, \$2.00.) Thirty authorities, including the editor, have contributed 28 articles to this valuable compilation, dealing with recent American-Japanese relations, under the five headings: "Bases of Japan's East Asiatic Policies," "Factors Affecting America's Far Eastern Policies," "The Problem of Cultural Divergence," "The Latest Phase in American-Japanese Relations," and "The Immediate Future." Professor Maddox is to be congratulated upon his choice of topics, his success in obtaining the coöperation of experts on every included topic, and his well-balanced and unified arrangement of the articles. The contributors have managed, each within the compass of a few pages, to interpret a phase of the general subject in a manner to interest the layman and enlighten the student. Four Japanese—three of them editors, the fourth an international lawyer—assist to broaden the approach to what proved to be a problem insoluble by peaceful means. While one would be glad to find fuller treatment of American commercial interests in southeastern Asia and of strategic aspects of Pacific politics, the collection is remarkably comprehensive and stimulative of further study.

The Renaissance of Asia. (Berkeley and Los Angeles: University of California Press, 1941. pp. xii, 169. \$1.50.) Six lectures delivered in April and May, 1939, on the Los Angeles campus of the University of California, are collected in this neat volume, for which Professor Malbone W. Graham has written an interpretative preface. Two lecturers deal with Japan—Dr. Kawaii with domestic factors affecting foreign policy, Professor Mah with Asiatic aims; one with China—Professor Steiner essays a glance into the future; one with India—Professor Klingberg reviews the movement for self-government and what Britain has done to satisfy it; one with Indo-China—Professor Knight touches a little-known area with revealing rays; and one with Soviet Russia—Professor Kerner sketches, largely from Russian sources, the evidences of Russian determination to maintain its position in Asia. The lecturers succeed admirably in a common purpose of providing succinct, stimulating résumés of recent developments in East Asian politics. The book will be as helpful for collateral reading in college courses as in the public library. HAROLD S. QUITLEY

The Greek White Book: Italy's Aggression Against Greece. (Published by the Greek Ministry for Foreign Affairs, Athens, 1940. pp. 139. Appendix). This official compilation of 183 diplomatic documents, official statements, extracts from the press, communiqués of semi-official news agencies, and an appendix containing the order of the day by the General commanding the Italian "Ferrara" division in Albania, covers the period from the eve of the Italian invasion of Albania in April, 1939, down to Italy's aggression against Greece on October 28, 1940. Despite inevitable lacunae, this publication presents a clear account of Italy's provocative attitude against Greece which ended in the ultimatum of October 28, 1940, and proves that assurances given by the Axis Powers to their neighbors and unreproachable attitude by the latter are but weak and temporary buttresses for peace. The book is preceded by the text of the Greek-Italian treaty of friendship and conciliation signed at Rome on September 23, 1928, and is divided in three parts. The first contains 75 documents from the eve of Italian invasion of Albania down to Italy's entry into the war; the second, 101 documents relating to Italian provocations against Greece from June 10, 1940, to October 27, 1940; and the last part, 6 documents containing the text of the Italian ultimatum handed by the Italian Minister at Athens to the Greek President and Minister for Foreign Affairs at 3 a.m. of October 28, 1940, circular to Greek legations, proclamations by the King of the Hellenes and the Prime Minister to the Greek people, and the first war communiqué. The chief value of this publication, which, apart from the English edition has been published also in Greek, French and German, is that it enables the unbiased reader to judge for himself the tragic effort of a small but heroic nation to stay out of the war and maintain its independence.

ACHILLES C. EMILIANIDES

Exchange Control and the Argentine Market. By Virgil Salera. (New York: Columbia University Press, 1941. pp. 283. Bibliography. Index. \$3.50.) Much of Dr. Salera's research in preparing this thorough and enlightening study was performed at Buenos Aires; and he has made excellent use of a wide variety of sources, relying heavily on Argentine materials. The book pictures the Argentine Republic in the fight for the stabilization of the peso and shows how, in the administration of exchange controls, Argentina favored the imports from its chief customer, Great Britain, over those from the United States. Since the British were the outstanding purchasers of Argentine beef and since they were not backward in threatening Argentina with the loss of some of this market, they were able to exact concessions from the Argentine Government. In the Roca-Runciman treaties of 1933 and 1936 it was provided that Argentina should make available for meeting remittances to Great Britain the full amount of exchange arising from Argentine exports to the British after deducting a reasonable sum for payments on the service of the Argentine public foreign debt. Purchasers of merchandise from Great Britain were, therefore, enabled to obtain in the official market the exchange with which to pay for their imports, while buyers importing goods from the United States were forced to procure most of their exchange in the "free market" at higher rates. British business thus obtained a telling advantage over exports from this country. Many other aspects of the exchange-commercial question are presented, but the preference for Britain in the years 1933-1940 is the chief theme of the book. Some of Dr. Salera's lengthy sentences are difficult to follow, but these are generally backed up by such a wealth of clarifying facts that the thought is eventually well il-

luminated. The book is heartily recommended to anyone interested in Latin American affairs, particularly so in view of the growing importance of our economic relationships with Argentina. The volume should also be of much use to students of foreign trade and exchange, for from this detailed description of the experiences of one country many clarifying illustrations revealing the nature of exchange restrictions and the possibilities of their use in affecting commerce may be gleaned.

BENJAMIN H. WILLIAMS

La Nacionalidad. Sus diversos sistemas en los 21 Paises Americanos. By Juan A. Lessing. (Buenos Aires: Libreria y Editorial "El Ateneo", 1941. pp. 70. Index. 90¢.) This is a popular monograph on a most important question in Latin America at this moment. The writer treats his subject with reference to the *acquisition* of nationality by origin, option, naturalization and reacquisition; and with reference to its *loss* by denationalization, extinctive option, and denaturalization. Although he bases his study on the constitutions, codes, special statutes, and conventions, he fails to mention the available administrative and judicial opinions which in many countries of Latin America have influenced the written law. No bibliography is given. Dr. Lessing sees the need for unification of the systems of nationality as a step toward the evolution of Pan Americanism; but it is regrettable that he has not employed his evident talents in the preparation of a more scientific, analytic and exhaustive study. There is little of value in this work except for the casual inquirer who would be satisfied with a superficial and popular view of the subject.

J. IRIZARRY Y PUENTE

An American Democrat. By Perry Belmont. 2d ed. (New York: Columbia University Press, 1941. pp. xvi, 729. Illustrations. Index. \$3.75.) Perry Belmont's memoirs are built about his letters and political speeches, with excursions into his travels in Europe and life as a sportsman. The early chapters draw much from the papers of his distinguished father, August Belmont, the immigrant New York banker, who served as Minister to The Hague before the Civil War. Interesting to the international lawyer and student of diplomatic history is quotation of a despatch of the elder Belmont to Secretary of State Marcy in 1856 calling attention to the significance for the United States of the Declaration of Paris in abolishing privateering but still allowing the capture of private property by public ships of war. Marcy used August Belmont's arguments in explaining the refusal of the United States to adhere to that Declaration, which otherwise codified the traditional American concept of the Freedom of the Seas. Perry Belmont was a vigorous opponent of James G. Blaine's questionable diplomacy with Chile and Peru, and in a Congressional hearing effectively exposed the self-interest of officers of the Department of State in a scheme for mediation between Chile and Peru after the nitrate war of 1880. Historians of American diplomacy have given inadequate emphasis to this unsavory episode. Belmont explains Blaine's Pan American policy of 1889 as a healthy reaction against the justifiable criticism which had been heaped upon him for the reprehensible Latin American diplomacy of his first incumbency.

SAMUEL F. BEMIS

The World's Destiny and the United States. A Conference of Experts in International Relations. (Chicago: World Citizens Association, 1941. pp. xx, 309. Index. 50¢.) This volume is a unique product of round table discussions carried on by 28 experts in international relations at a con-

ference called by the World Citizens Association in April, 1941. The discussions were conducted in the spirit of the purposes of the sponsoring Association, and were devoted to the analysis of problems of the present and the future world order. The defects of the League were stressed: its lack of universality, and of power to take the initiative; its inherent weakness, owing to its limited grant of power in important matters; the imperfect coöperation of the major Powers, and, especially, the absence of the United States from its ranks. For these and other reasons, the League of 1920 is not to be counted on for the settlement of major crises in the political, legal and economic fields. A hopeful view is expressed regarding the prospects for more effective American coöperation in the post-war world, and it is felt that the international community must guarantee the "New Rights of Man," in the political, social and economic fields. The outlines of the "New Political Order" are sketched, with emphasis on the gigantic economic and financial problems that will need solution. It is believed that the economic and political problems cannot be solved separately. Their solutions must proceed simultaneously. A vast international educational program will be necessary, based on the ideas of humanism, liberty, tolerance and a belief in the great possibilities of science. "A firm and lasting partnership among the democracies" constitutes the first "peace aim." Clarence Streit's plan impliedly is recognized as sound in its essentials. Much of the discussion of the conference is far ahead of public thinking, and many proposals seem somewhat idealistic, or, perhaps, over-hopeful. Yet it is very significant that these proposals represent the consensus of this highly qualified group of thinkers. The discussions are very well written up, being woven into a pattern which makes reading easy and interesting. They are as relevant today as they were a year ago.

G. BERNARD NOBLE

The Failures of Peace. By Kent Forster. (Washington: American Council on Public Affairs, 1941. pp. vi, 159. Bibliography. Cloth, \$2.50; paper, \$2.00.) This is a painstaking study of the reasons why no peace by compromise and agreement was reached during the course of hostilities between 1914 and 1918. It deals with the conflict between the desire for peace and nationalistic policies of securing victory in the war, as the author sees it, during that period. It includes such topics as the German peace effort of 1916, Wilson's efforts in that direction in the same year, Austrian efforts in 1917, the Stockholm Conference, and appeals for peace made by the Vatican. The conclusion is drawn that no negotiated peace came about because of "the nationalistic fever of the dozen men who controlled the instruments of diplomacy," and because "they were strong-willed enough and dynamic enough to harangue, propagandize, or browbeat sufficient numbers of their countrymen into tolerating their policies" (p. 151). Elsewhere, "almost complete lack of popular control over the conduct of foreign affairs" is, somewhat inconsistently, in view of the foregoing, blamed (p. 145), and nowhere is the question examined of how much or how widespread a "will to peace" existed in the various countries or how much browbeating was necessary before it could be "tamped down" (p. 2). Most of the feverish nationalism is portrayed by the author as residing on the side of the Allies. Two assumptions made are that a compromise peace was preferable and that "there is another Germany which cherishes the concepts of decency and peace. With that Germany a compromise is fully possible" (p. 152); the latter assumption is made concerning the present situation but obviously underlies the whole thesis. The validity of the first assumption is not ar-

gued nor is the extent or power of the decent and pacifically inclined groups in Germany considered. As has been noted already, the research and analysis, with the exceptions mentioned, seem painstaking and thorough.

PITMAN B. POTTER

Atrocity Propaganda, 1914-1919. By James Morgan Read. (New Haven: Yale University Press, 1914. pp. xiv, 319. Bibliography. Index. \$3.50.) The author has written a useful summary of the large literature dealing with atrocity propaganda. He has retold a familiar story, and there is little that is new in his narrative. He is able to make some small corrections in the well-known monograph by Sir Arthur Ponsonby, and he adds some details to the general accounts of atrocity literature in France and in Germany. His comments upon the famous cases of Edith Cavell, Captain Fryatt and Mata Hari are neither original nor particularly enlightening. Mr. Read does not tarry too long over these significant items in the dreary catalogue of wartime atrocities. He attempts to deal with every aspect of atrocity propaganda, and he endeavors to evaluate the validity of the charges that were levelled against the soldiers of the Central Powers. He has no difficulty in demonstrating the needless cruelty of the German military authorities in Belgium, and is able to adduce some evidence that all German soldiers were not unregenerate, but that their practices were the usual accompaniment of war. His account of Turkish atrocities in Armenia makes the reader wonder how that unfortunate nation was saved from utter destruction. In this connection one cannot help remembering the statement of Djemal Pasha to the effect that the Armenians themselves had been guilty of the murder of some 1,500,000 Turks and Kurds. There is little doubt that murder stalked through Asia Minor from 1914 to 1918, and it is apparent that he did not always wear the guise of a Turk. Mr. Read endeavors always to be objective in his digest of this large mass of atrocity literature, and his monograph will have value for students who are interested in the various types of propaganda techniques that were employed during the World War.

CHARLES CALLAN TANSILL

Diplomacy and God. By George Glasgow. (London, New York, Toronto: Longmans, Green & Co., 1941. pp. xii, 237. Index. \$2.50.) The title of this book is intriguing; so are many of the author's observations and convictions. The book, unfortunately, suffers from a lack of coherence, due in large part to the fact that it has obviously been thrown together from various articles appearing originally in the *Contemporary Review*. Many questions, such as, for example, the causes of the present war, are treated with much acumen. The *leit motif*, however, is the failure of statesmen (wrongly confused with diplomats) to take God into account. The reflections and conclusions of an experienced journalist and sincere mystic are surely worthy of earnest consideration. They are a refreshing contrast to the drab theories and convictions of economic determinists and cynical statesmen. The book itself bears eloquent witness to the freedom of thought permitted by a democracy fighting for its existence.

PHILIP MARSHALL BROWN

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* Mention here does not preclude a later review.

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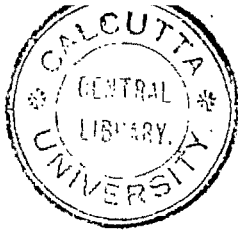
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WILBUR S. FINCH



THE DRAFTING OF NEUTRAL ALIENS BY THE UNITED STATES

BY WILLIAM W. FITZHUGH, JR., U.S.N.R., * and CHARLES CHENEY HYDE,
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The Alien Registration Division of the Immigration and Naturalization Service has announced that there are 695,363 alien Italians in the United States and 314,715 alien Germans. The census of 1940 indicated over eleven million white inhabitants born in a foreign country residing in the United States, and a recent release shows that about 65% of these became naturalized citizens.¹ It can be calculated, therefore, that we have in this country, excluding orientals, a neutral alien population of about two millions. Are these persons protected by virtue of alien status from liability to military service? The issue has been confused by claims that rights under international law are violated by forcing neutral aliens to serve. In what follows, attempt is made to show that no controversial issue of international law need be raised, and that no such issue need interfere with the legal and domestic right of the United States to request alien service.

To what lengths, then, may the United States properly go to induce neutral aliens to bear arms in its behalf? May the United States properly raise barriers or create serious disabilities under domestic law for those aliens who refuse service? The history of its law and policy regarding military service produces no evidence to the contrary, provided that the right of a civilian alien to depart is not infringed. No question of protection from liability to military service is therefore involved. That issue is believed to be wholly irrelevant to the question at hand.

Voluntary service in itself does not raise any issue of international concern,² but it is paradoxical to find a general tendency to exclude aliens from this kind of service even where the right to draft the same persons has been upheld.³ As might be expected, the military services have objected to alien volunteers. This has led occasionally to conflict between political and military policy. A notice posted throughout France in 1914, for example, announced: "Foreigners who wish to enlist for the duration of the war will present themselves at the recruiting office nearest their residence . . ." ⁴ However, those who did so found that they could enlist only "au titre de la légion étrangère." ⁵ When war threatened in 1939 the same regulations ap-

* This article was prepared while Mr. Fitzhugh was on the staff of Columbia University. The views presented herein are those of the authors and do not necessarily reflect the opinions of the Navy Department.

¹ U. S. Dept. of Commerce, Press Release, Dec. 13, 1941, Census Bureau.

² IV Moore, *International Law Digest*, p. 50.

³ New York Times, Sept. 3, 1941.

⁴ *Journal Officiel* (1914), 7232.

⁵ *Ibid.*, Notice, Aug. 7, 1914.

plied, and the French cabinet, under pressure of public opinion which felt that refugees should be allowed to serve, decided on April 16 to permit foreigners to enlist in the regular army.⁶ A week later, however, the Ministry of National Defense issued a statement discouraging their enrollment.⁷ In May the government again asked for the voluntary services of foreigners in the event of war, but when war did break out in September Polish exiles and other foreigners living in France who applied for army service were told they must wait. That it was military reluctance rather than any law against service was shown by the news prominence given H. Clauzel, a Latvian, who continued his family tradition of serving a period in the French army.⁸

At the Hague Conference in 1907 an attempt was made by the German delegation to put the question of voluntary as well as compulsory service on an unequivocal basis by incorporating the following article in the report of the Second Commission: "Belligerent parties shall not ask neutral persons to render them war services, even though voluntary."⁹ The United States supported the proposal. General G. B. Davis, writing in this JOURNAL just afterwards, regretted that the opportunity was not more fully taken advantage of.¹⁰ As a matter of fact, and tending to cast doubt upon the view that it raises no issue of international concern, the clause forbidding voluntary service caused the greatest difficulty and led to the abandonment of the whole proposal.¹¹

The early policy of the United States regarding military service may have been influenced, even indirectly, by the American attitude that resented forcible impressment. It is perhaps not surprising to find that an Act of Congress of 1802¹² specifically limited enlistment to citizens, and although the provision was not reenacted in any subsequent law, Secretary of State Day in a diplomatic circular of 1898 declared that aliens were not allowed to enlist in the regular army.¹³ Today, alienage is still a bar to enlistment in the Army, Navy, or Marine Corps, and though aliens may be drafted into the Army (some 6,300 were reported serving recently), they may not become officers. The Navy and the Marines receive no aliens whatsoever.¹⁴

The voluntary enlistment of aliens is entirely a matter of domestic regulation. Without indulging in an extensive survey, the evidence appears to substantiate the statement made in Dr. Lauterpacht's latest edition of Oppenheim's *International Law*:

A belligerent is permitted to enlist the subjects of other States, whether Allies or neutrals, into its forces, either as combatants or non-

⁶ New York Times, Apr. 17, 1939, 5:2.

⁷ *Ibid.*, Apr. 23, 1939, 31:5.

⁸ *Ibid.*, May 10, 1939, 15:2; Sept. 5, 1939, 14:3; and June 25, 1939, VII, 18:2, respectively.

⁹ *Actes*, III, 266, Annex 36, Art. 64.

¹⁰ This JOURNAL, Vol. 2 (1908), p. 811.

¹¹ A. S. de Bustamante, in this JOURNAL, Vol. 2 (1908), pp. 100, 115.

¹² 2 Stat. 132, March 16, 1802, IV Moore, Digest, p. 50, cited by Atty. Gen. Cushing in 1854: 6 Op. 474.

¹³ May 12, 1898. Moore, *op. cit.*

¹⁴ New York Times, Sept. 3, 1941.

combatants, and hardly a single war occurs in which this is not done. Nor do the alien subjects who thus enlist commit thereby any offense against the rules of international law . . .¹⁵

Dr. Lauterpacht is seemingly referring to voluntary service, a conclusion that is accentuated by the views of his predecessor, Dr. Oppenheim, set forth in volume one of his treatise,¹⁶ with respect to compulsory service, and with which Dr. Lauterpacht appears to be in entire agreement. Thus he declares that "a State cannot treat foreign citizens passing through or residing on its territory arbitrarily according to discretion as it might treat its own subjects; it cannot, for instance, compel them to serve in its army or navy."¹⁷ It should be observed, however, that these eminent publicists were not discussing or referring to the precise problem here being considered. Because that problem is what it is, it is unnecessary to inquire whether British policy has always consistently adhered to the rule as enunciated at Cambridge University.¹⁸

At first glance the policy of the United States appears to lack uniformity. The issues confronting it have not been always clearly defined or understood because of the injection of mental toxicity emanating from the class of neutral aliens known as declarants, who, because of their obvious aspirations to attain American citizenship, were regarded at times as the possessors of a peculiar status that differentiated them from other aliens. Confusion was apparent, moreover, in the character of some draft legislation by the United States. Although the Civil War Act of March 3, 1863, included so-called declarant aliens,¹⁹ as did the Spanish American War Act of April 22, 1898,²⁰ and the World War Act of May 18, 1917,²¹ the last was drawn so badly that non-declarant aliens as well could be held liable to service, and in fact a good many were actually inducted.²² Section 5 of this Act provided for the registration of all male *persons*, who were to remain "subject to draft unless exempt or excused therefrom as in this act provided." The trouble was that non-declarants were nowhere excused, although Section 2 permitted only male citizens, or "male persons not alien enemies who have declared their intention to become citizens" to be eligible for training and service.

¹⁵ Lauterpacht's 6th ed. of Oppenheim, II, 207.

¹⁶ I Oppenheim, 1st ed., 175.

¹⁷ Lauterpacht's 5th ed., I, 237. Also Vattel, *Law of Nations*, 173; *In re Siem*, 284 Fed. 868, (1922) D. C., Montana; Bluntschli, Art. 391; Bonfils, No. 445; Hall (5th ed.), 207-209; I Halleck, 419-420; Lawrence, Sec. 117; I Westlake, 211-212; II Wharton, Sec. 202. Also S. Edmunds in 5 St. Louis Law Rev., 24 (March, 1920).

¹⁸ Although United States policy frequently denied this even with regard to British-born naturalized Americans residing in England. See Henry Clay's statement dated June 19, 1826, in Instructions to U. S. Ministers, XI, 95, quoted by R. L. Morrow in this JOURNAL, Vol. 30 (1936), p. 656. United States policy oscillated markedly. Note also that in 1846, England, with France, espoused the cause of her drafted nationals, and blockaded the port of Buenos Aires. Fiore, *Nouv. droit int. pub.*, Sec. 647, quoted by Edmunds, *loc. cit.*

¹⁹ 12 Stat. 731, Sec. 1.

²⁰ 30 Stat. 361, c. 187.

²¹ 40 Stat. 76, Sec. 2, 5.

²² H. B. Hazard, in this JOURNAL, Vol. 21 (1927), p. 45; 23 *ibid.*, 783; Second Report, Provost Marshal General, Ch. IV, G.P.O. (Washington), 1919; Edmunds, *loc. cit.*

In accordance with Section 2, more than a million registrants were deferred between July, 1917, and October, 1918, because of alien status.²³ On the other hand, following Section 5, about 200,000 were drafted, and at the time when the Armistice was concluded, some 40,000 complaints, protests and requests had been filed at the Department of State by diplomatic representatives of various neutral countries.²⁴

Such protests were not new. American diplomatic correspondence before the World War I contained frequent reference to military service of aliens in the United States, and particularly to the status of so-called declarant aliens, which was not always appreciated or understood abroad. In 1804 Madison expressed the view that neutral aliens could "never be rightfully forced into military service, particularly external service," and that they were protected therefrom by the law of nations.²⁵ This statement sufficed until the time of the Civil War, and even into the middle of that war, for Secretary of State Seward wrote Governor Morton of Indiana in 1862, that "there is no principle more distinctly and clearly settled in the law of nations, than the rule that resident aliens not naturalized are not liable to perform military service."²⁶ Seward had written in the same vein to Mr. Gamble only a few weeks previously: "I can hardly suppose that there exists, anywhere in the world, the erroneous belief that aliens are liable here to military service."²⁷ Nevertheless, Lord Lyons, the British Minister, continued to bring up cases of alleged alien service, basing his protests on the fact, which Seward had pointed out to Governor Morton, that "the law of Great Britain holds that a native British subject owes allegiance to the British government until he has completely effected his naturalization in the United States and under the laws of Congress."²⁸ Seward hoped that this would not interfere too much with enrollment in the State militia, which was open to citizens of a State even if they were not citizens of the United States.²⁹

On March 3 of the following year, however, the Conscription Act had passed and Seward was obliged to admit that aliens could, after all, be drafted in the United States—if they had filed their first papers, or if, through the looser operation of State laws, they had exercised the franchise.³⁰ After the war Seward even declared that under extreme conditions the right of a nation to draft domiciled foreigners might exist. The right to draft any and every-

²³ Second Report, Provost Marshal General, *ibid.*, p. 168.

²⁴ According to Edmunds, *loc. cit.*, p. 24.

²⁵ IV Moore, Digest, p. 52.

²⁶ *Ibid.*, pp. 53-54. Quoted approvingly in *ex parte* Blumer, 27 Texas, 734. This was a letter of Sept. 5, 1862.

²⁷ Letter of Aug. 14, 1862, 58 Ms. Docs., No. 69; IV Moore, Digest, pp. 52-53.

²⁸ Although apparently most foreign governments acquiesced in the view that exercise of suffrage rights forfeited former allegiance. See 2 Wharton, Sec. 202; IV Moore, Digest, p. 54. 2 Halleck, 365, refers to Great Britain's threat of joint neutral action on this score in 1861.

²⁹ Cf. 12 Stat. 597, July 17, 1862, which allowed only "citizens" to serve in the militia.

³⁰ Communication to Mr. Williams, Nov. 24, 1863, IV Moore, Digest, p. 54. See note 28 above.

body under really extreme conditions, such as floods, catastrophes, or native uprisings, has indeed been quite generally recognized.³¹ Such emergencies are, however, very different from the straightforward operation of national draft acts in time of war. Secretary Fish pointed out in 1869 that although the United States had waived the exercise of the right to draft aliens, it had never been surrendered, and we "cannot object if other governments insist upon it."³² Nevertheless, Secretary Bayard found occasion in 1888 to inform the American Minister to France that in the course of the Civil War there was "not a single instance in which an alien was held to military duty when his Government called for his release."³³

Although the United States may never have surrendered the right to draft aliens, the proposal of the British Government, outraged at the prospect of unnaturalized British subjects being drafted, that declarant aliens be allowed to revoke their status and be given 65 days in which to leave the country was quickly accepted by the United States and proclaimed by President Lincoln.³⁴ It is believed that the British concession was reasonable and sound. It proved to be suggestive of a theory which the United States eighty years later found it expedient and possible to apply in the consummation of numerous treaties. It should be observed that the proclamation by President Lincoln excluded those who had exercised political privileges under State laws. Foreign governments uniformly declined to interpose in behalf of their declarant, and hence somewhat errant, nationals who chose to remain.³⁵

Between the Civil War and the World War, one dispute involving the

³¹ Signed Feb. 20, 1928 (4 Malloy, 4722), Treaty Series No. 815. See Bluntschli, *Das mod. Völkerrecht der civ. Staaten*, § 391 (3rd ed., Nördlingen, 1878); II Hyde, *Int. Law*, p. 245. Both Seward and Bayard excepted extreme necessity, IV Moore, *Digest*, pp. 57, 62. Great Britain agreed to this "Transvaal Rule." U. S. For. Rel. 1894, 253. See Seward to Ashboth, March 27, 1867, in IV Moore, *Digest*, pp. 56-57.

³² IV Moore, *Digest*, p. 57.

³³ U. S. For. Rel. 1888, I, 510, 512.

³⁴ May 8, 1863, 13 Stat. 732. "Whereas it is claimed by and on behalf of persons of foreign birth . . . who have heretofore declared on oath their intentions to become citizens under and in pursuance of the laws of the United States, and who have not exercised the right of suffrage or any other political franchise under the laws of the United States or any of the States thereof, that they are not absolutely concluded by their aforesaid declaration of intention from renouncing their purpose to become citizens, and that, on the contrary, such persons, *under treaties or the law of nations*, retain a right to renounce that purpose and to forego the privileges of citizenship and residence within the United States under the obligations imposed by the aforesaid act of Congress: . . ."

Sixty-five days from the date of the proclamation was allowed the declarant alien to leave the United States or be considered liable to military service. (*Italics inserted.*)

Messages and Papers of the Presidents, Vol. 5 (1913), p. 3369.

³⁵ Parl. Papers, No. 337, 1863. Some writers have felt that this was an unnecessary concession: see J. W. Cutler, in this JOURNAL, Vol. 27 (1933), pp. 225, 232; Hall, *Int. Law* (8th ed.), 259-261; 3 Scott, *Proceedings of The Hague Peace Conferences*, Conference of 1907, p. 188; *In re Wehlitz* (1863), 16 Wisc. 443; Conn. Gen. Stat. (1930), Sec. 746; *Ex parte Larrucea*, 249 Fed. 981 (decision in this JOURNAL, Vol. 13 (1920), p. 119); 27 Yale Law Journal (1918), 683.

United States in a question of alien liability for military service stands out. In 1880 a party of allegedly American citizens were forcibly impressed into the Mexican army. Mexico claimed that the courts were open if a grievance existed, but the United States pointed to the treaty of 1831 which should have exempted American citizens in the first place. Secretary Evarts made strenuous objection, writing incidentally, that "no single instance is met with in which the Mexican citizen's claim to exemption from military service in the armies of the United States was not promptly recognized and respected by this government."³⁶ Secretary Blaine, who carried on the dispute, was evidently not so sure; for passing beyond treaty rights, to claim that "public law and international comity" had been violated by Mexico he had to admit that the United States' record was not entirely clear. He hastened to add that what had happened during the Civil War had been merely "accidental or involuntary enrollment of unnaturalized aliens" who were "at once discharged upon complaint made and in the absence of proof of their naturalization."³⁷

It is not necessary, and hence not here sought, to reconcile the views expressed at various times by Secretaries Seward, Fish, Evarts and Blaine. It should be clear that neutral declarants did not cease to be aliens because of the initial steps which they had taken to become American citizens. There was no greater right possessed by the United States to compel neutral declarants residing on American soil to serve in its forces than other neutral aliens there residing. If it had been struggling to marshal the full measure of its rights under international law pertaining to compulsory service, the United States would have found itself obliged to deal with declarant and non-declarant neutral aliens in the same way.³⁸ The point to be observed, however, is that the United States was not in fact, at least in the final operation of its laws, asserting the principle that a resident neutral alien could be made to serve. It was essaying to do quite a different thing—to exact a price for its citizenship, or to exact a price for the privilege of residence within its domain. Thus the practical significance of a declaration of intention by an alien to acquire American citizenship through naturalization was the circumstance that it revealed the declarant as a probable petitioner for

³⁶ IV Moore, Digest, p. 60. The treaty is found in I Malloy, 1085. It was terminated by Mexico Nov. 30, 1881, though apparently not on this issue alone. See U. S. For. Rel. 1881, No. 485.

³⁷ IV Moore, Digest, pp. 60-61.

³⁸ Declared Judge Moore in 1918: "In truth, much confusion in the discussion of this subject has resulted from the supposition that, in making the declaration of intention to become a citizen, the declarant is required to forswear, and in fact does forswear, his allegiance to the government of the country from which he came. Not only is this a popular supposition; it has even found expression now and then in official documents. But it is quite destitute of foundation." (Principles of American Diplomacy, 299-300.) See averments required in a declaration of intention as laid down in Sec. 331 of the Nationality Act of 1940. 54 Stat. 1153; this JOURNAL, Supp., Vol. 35 (1941), p. 98.

a much-desired privilege for which he might be disposed to pay a heavy price if it were demanded of him. Secondly, it revealed that individual as a prospective permanent resident on American soil who planned to abide thereon. The declarant thus opened the door to the United States to demand that he abandon his plan and become ineligible to naturalization if he declined to serve under its flag in time of war. His own country could not complain at the character or stiffness of such terms.³⁹

It may be observed that Judge Moore has declared, with reference to certain statements by Mr. Seward, that he "at one time argued that the provision of the act of 1863, subjecting to military duty persons who had declared their intention to become citizens, operated, in connection with another provision of the same act, directing the issuance to such persons of passports, as a process of naturalization, which the proclamation gave them the option of accepting, by staying in the United States, or of declining, by going away."⁴⁰ Again, a federal court, in applying the Draft Act of May 18, 1917, appeared to take the view that a person who had declared his intention to become an American citizen and to give up his former allegiance could be inducted into the service of the United States even if his declaration had expired, if no formal withdrawal had taken place.⁴¹

In vivid contrast to the foregoing, stands out the statement of Secretary Lansing in 1917, that while there was a "measurable conflict" of opinion as to the law, the position of the United States in exempting neutral aliens from military service had been uniform.⁴² In so saying, he hit the nail on the head. The fact is that the United States has never, in the face of foreign opposition, persisted in the attempt to draft non-declarant aliens;⁴³ and on three occasions, in 1863, in 1917 and in 1940, following an attempt to draft declarant aliens, the statutory law was modified in order to make room for exemptions.

Notwithstanding the difficulties which had led, in 1863, to the presidential proclamation in effect amending the draft Act of that year, when the Spanish American war broke out, the resulting Act of 1898 unqualifiedly included declarants.⁴⁴ The war did not last long enough and volunteers were too numerous for trouble on this score to result in amendment. When, however, like provisions were enacted in the Act of May 18, 1917,⁴⁵ adminis-

³⁹ The exaction of them violated no requirement of international law.

⁴⁰ IV Moore, Digest, p. 56 n.

⁴¹ *United States ex rel. Bartolini v. Mitchell*. 248 F. 997. See also H. B. Hazard, in this JOURNAL, Vol. 21 (1927), pp. 40-52, and *idem*, Vol. 23 (1929), pp. 783-809.

⁴² See statement in Hearings Before Committee on Military Affairs, House of Representatives, 65th Cong., 1st Sess., on S. J. Res. 84, Sept. 26, 1917, p. 10. See also in this connection H. T. Kingsbury, in Proceedings, American Society of International Law, 1911, pp. 214, 220, 223.

⁴³ Although, occasionally, zealous draft boards have done so. See S. Edmunds, in 5 St. Louis Law Rev., 24 (March, 1920).

⁴⁴ 30 Stat. 361.

⁴⁵ 40 Stat. 77.

trative regulation proved ineffective, and Congress was obliged to make the amendment of July 9,⁴⁶ which incorporated the substance of the Lincoln proclamation but did not insist upon the departure of the declarant claiming alienage. There was to be "a declaration . . . withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States."⁴⁷ The same Act regularized the status of aliens who came under treaty provisions⁴⁸ which, according to the Larrucea case, had been superseded by the original Act.⁴⁹

Several bills introduced into Congress about this time attempted to bar *non-declarant* aliens from citizenship in a similar fashion. All failed of passage.⁵⁰ As Mr. Hazard says, "The only reasonable inference the court was able to draw was that Congress did not intend to proscribe the former class."⁵¹ (Non-declarant aliens.) Mr. Hazard's analysis of the cases arising from the 1917 draft Act shows that petitions for naturalization were denied on the grounds of having pleaded alienage to avoid service in 245 cases in 1920, 1,736 in 1921 and 10,288 in 1922.⁵² He disclaims, however, any attempt to settle the ultimate problem of alien draft liability,⁵³ and the divergence of judicial opinion on this subject is marked.⁵⁴

In the light of the history of the 1917 Act, it is somewhat surprising to find that the Selective Service Act of September 16, 1940,⁵⁵ again made the futile attempt to include declarant aliens without provision for exemption. The confusion regarding non-declarant aliens resulting from the bad drafting of the 1917 Act was cleared up, however, by separating registration, to

⁴⁶ 40 Stat. 845, c. 143, subch. 8.

⁴⁷ Repeated in 40 Stat. 955, c. 166. Code Title 8, Par. 79.

⁴⁸ See below, p. 12 ff.

⁴⁹ *Ex parte Larrucea*, 249 Fed. 981 (1917). *In re Dragutin Blazekovic*, 248 F. 327 (U. S. District Ct., E. Dist. Mich. S. Div.) likewise.

⁵⁰ This was stated by the court in *Tutun v. United States*, 12 Fed. (2d) 763-765 (May 29, 1926). (Advance Sheets.)

⁵¹ H. B. Hazard, in this JOURNAL, Vol. 21 (1927), p. 46.

⁵² This JOURNAL, Vol. 23 (1929), p. 784.

⁵³ *Ibid.*, p. 792, n. 19.

⁵⁴ Accord: *Slade v. Minor*, Fed. Cas. No. 12, 937 (C.C.D.C. 1817); *Barrett v. Crane* (1844), 16 Vt. 246; Kans. Const. (1859), Art. 8, s. 1; *Ex parte Blumer*, 27 Tex. 734. See Adv. Opinion of P.C.I.J., Nationality Decrees in Tunis and Morocco (1923), Ser. B., No. 4. *Contra: In re Toner* (1864), 39 Ala. 454; *Ansley v. Timmons*, 3 McCord 329 (S. C. 1825); Cf. *U. S. v. Wyngall*, 5 Hill, 16 (N. Y. 1843); *U. S. v. Cottingham*, 1 Rob. 615 (Va. 1843). Also see *In re Siam*, 284 Fed. 868 (Mont. 1922), where Judge Bourquin discusses the political status of persons and the obligations of aliens and citizens under municipal and international law; and *In re Naturalization of Aliens*, 1 F. (2d) 594 (Wisc. 1924), where Judge Geiger gives a comprehensive review of alien status.

Exemption from service was not considered a bar to naturalization if no lack of "attachment to the principles of the Constitution" could be shown. For an analysis of the numerous cases, see Hazard, *loc. cit.*

⁵⁵ Public Law No. 783, 76th Cong. Text in C.C.H. War Law Service, Vol. 1, p. 18102.

which all male residents are now made liable, from training and service, which applies to "every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen" This Section 3 (a) was entirely recast a year later by an amendment which stated:

That any citizen or subject of a neutral country shall be relieved from liability for training and service under this act if prior to his induction into the land or naval forces, he has made application to be relieved from such liability . . . , but any such person who makes such application shall thereafter be debarred from becoming a citizen of the United States: . . .⁵⁶

It cannot then be said that the United States has not tried to draft declarant aliens, but in three major wars the original wording of the draft Acts has had to be modified. Recent amendments have, moreover, given the alien an even greater range of exemption than hitherto; for it will be recalled that in 1863 the exempted alien had to leave the country within 65 days.

In relation to the Selective Training and Service Act of September 16, 1940, Secretary Hull, in his communication of April 15, 1941, to the Speaker of the House of Representatives, made the significant statement that the Department of State had received communications from a number of foreign diplomatic missions complaining that nationals of their countries were being drafted for training and service. He added:

Some of these complaints are based on treaty provisions and the Mexican Embassy has taken the position that the drafting of its nationals for military service is contrary to the principles of international law. The Department is desirous of honoring the treaty obligations of this Government, and after conferences with the other interested agencies of the Government, it has concluded that the appropriate way to solve the problem is by the amendment of the Selective Training and Service Act. It is therefore suggested that the proposed amendment, a copy of which is enclosed, be enacted into law.⁵⁷

It is an impressive fact that the amendment to the Act, responsive to the Secretary's suggestion, gave to neutrals, as noted above, broad relief from liability for training and service, and that without demanding departure from American soil as the price to be paid for it.

The treaties of the United States imposing limitations upon the exaction of military service from neutral nationals have not been uniform, although they followed a distinct pattern. The early treaties of amity and friendship and those of commerce and navigation made frequent reference to military service. That concluded with the Netherlands in 1782,⁵⁸ was the first example. Article 8 contained a prohibition against seizure of goods and

⁵⁶ Public Law 360, 77th Cong., approved Dec. 20, 1941. Text in C.C.H. War Law Service, Vol. 1, p. 18103.

⁵⁷ Dept. of State Bulletin, April 19, 1941, 478.

⁵⁸ 2 Malloy, 1233, abrogated by overthrow of the Netherlands Government in 1795.

"men of all kinds . . . for any military expedition . . ." ⁵⁹ A like exemption was set forth in the treaty with Sweden of 1783,⁶⁰ and also in the treaty with Prussia of 1785.⁶¹ The treaty of amity with France of 1778 contained no reference to military service; but in 1788 a consular convention was concluded which exempted the nationals of both countries "from all personal service". The treaty was abrogated in 1798 and no subsequent treaty with France has afforded mutual exemption.

The Jay Treaty, concluded with Great Britain in 1794,⁶² contained in Article 21 the interesting provision that the enemies of either party should not be permitted to enlist nationals of the other. This provision expired in 1807, and military service was not touched upon in any other treaty with Great Britain until 1918.

The treaty with Spain in 1795 ⁶³ was the last for quite a while to allow exemption without indemnity. In 1799, the year that Napoleon overthrew the Directory and became master of France, the Prussian treaty was re-enacted, and from then until 1831 the customary clause was as follows:

The citizens of neither of the contracting parties shall be liable to any embargo, nor be detained with their vessels, cargoes, merchandises, or effects, for any military expedition, nor for any public or private purpose whatsoever, without allowing to those interested a sufficient indemnification.⁶⁴

The 1831 treaty with Mexico, however, made the modern distinction between *goods*, which required indemnity, *military services*, which were totally exempted from requisition, and *loans, taxes, contributions*, etc., which were legal if enforced without discrimination.⁶⁵ Five years later a treaty with the Peru-Bolivian Confederation made the same distinctions, but prohibited forced loans and contributions altogether.⁶⁶ This was a sort of high-water mark. Treaties on the old model of Napoleonic days continued to be concluded right on until 1850, with Chile, Venezuela, Ecuador, New Granada (Colombia), Guatemala, and Salvador,⁶⁷ although the Mexican arrangement was tried again with the Kingdom of the Two Sicilies in 1845.⁶⁸

The Hawaiian treaty of 1849 marked a slightly new approach in that military service and forced loans were prohibited, but other taxes and contributions generally enforced were allowed.⁶⁹ Argentinian and Costa Rican agreements in 1853 and 1851 were the same.⁷⁰

The Swiss convention of 1850 provided thoroughgoing equality: military

⁵⁹ 2 Malloy, 1236.

⁶⁰ 2 Malloy, 1731. Treaty expired in 15 years but relevant article revived in subsequent treaties. (Art. 17).

⁶¹ 2 Malloy, 1482, Art. 16.

⁶² 1 Malloy, 496, Art. 14.

⁶³ 2 Malloy, 1643. Art. 7.

⁶⁴ 2 Malloy, 1492, (16). Text quoted taken from Art. 5 of Colombian Treaty of 1824, 1 Malloy, 294, (5).

⁶⁵ 1 Malloy, 1088, Arts. 8, 9.

⁶⁶ 2 Malloy, 1376, Art. 4.

⁶⁷ 1 Malloy, 173, (5); II, 1833, (8); I, 424, (8); I, 304, (8); I, 863, (7); II, 1540, (8); respectively.

⁶⁸ 2 Malloy, 1808, (6).

⁶⁹ 1 Malloy, 911, (8).

⁷⁰ 1 Malloy, 23, (10), and 344, (9), respectively.

exemption if the tax in lieu of service was paid, and equality in other war charges.⁷¹ That this was unusual was shown by subsequent treaties with Paraguay, Venezuela, Haiti, Honduras, and the Dominican Republic drawn on the Hawaiian model.⁷²

In the meantime an attempt was made to improve treaties drawn on the older indemnity model. The treaty with Peru in 1851 stipulated, for example, that the indemnity be paid in advance.⁷³ The Bolivian treaty of 1858⁷⁴ had the same provision which caught up with reality fifty years later when the treaty with Spain (1902) added the significant words, "if possible."⁷⁵

By the time the treaty with Italy was signed in 1871⁷⁶ it had become customary to include exemption from military service, provide for indemnity on requisition of goods, and allow for varying degrees of exemption from war charges. This was true of treaties with Nicaragua, Serbia, Congo, Tonga, Japan (both in 1894 and 1911), Spain, and Siam.⁷⁷ The Peruvian treaty of 1887 exempted United States citizens from forced loans for war, but military service was not mentioned.⁷⁸ The Swiss convention of 1850 and a similar one concluded with the Orange Free State in 1871 were the only two specifically permitting charges in lieu of military service.⁷⁹

Two conclusions emerge from a survey of pre-World War treaties concluded by the United States: (1) with the possible exception of those with Italy and Japan, they were not concluded with major Powers; and (2) the tendency was general in Latin America and prevalent elsewhere to exempt aliens from military service or from loans and charges in lieu of military service or of a discriminatory nature.

An attempt to draw up a general treaty covering alien liability to military service was made at The Hague in 1907. The German proposal, which excluded even voluntary service, has been mentioned. Colonel Borel, with the full assent of the *Comité de Rédaction* of the Third Commission, proposed an alternative Article 64 which he felt to be "in harmony with the general practice of nations." It read as follows: "Belligerent parties shall not re-

⁷¹ 2 Malloy, 1764, (2). See U. S. For. Rel. 1894, p. 678: the United States was estopped from complaining of this Swiss tax on resident Americans because the State Department had agreed to the Swiss construction of the 1850 treaty. The interesting fact is that the United States was concerned about the matter. Adee was anxious to find out how Swiss citizens in the United States were treated and polled 42 States on the question. His conclusion was ". . . that the States of this Union do not impose compulsory military service, except in cases of extraordinary emergencies, nor compel the payment of any equivalent tax in money. All militia service is voluntary . . ." Adee to Broadhead (U. S. Minister in Berne), Aug. 10, 1894. For. Rel. 1894, p. 682. Tax liability ended in 1894. See IV Moore, Digest, p. 66.

⁷² Malloy: 2, 1367, (11); 2, 1846, (2); 1, 922, (5); 1, 955, (9); 1, 404, (2).

⁷³ 2 Malloy, 1389, (2). Compare the 1836 treaty.

⁷⁴ 1 Malloy, 114, (3).

⁷⁵ 2 Malloy, 1703, (5).

⁷⁶ 1 Malloy, 970, (3, 4).

⁷⁷ Malloy: 2, 1282, (9); 2, 1615, (4); 1, 329, (3); 2, 1783, (9); 1, 1029, (1); 3, 2713, (1); 2, 1703, (5); and 3, 2830, (1). ⁷⁸ 2 Malloy, 1432, (2). ⁷⁹ 2 Malloy, 1764, (2); 1311, (2).

quire of neutrals services directly connected with the war." He also presented as Article 65 a statement which would have excepted voluntary enlistment. Both proposals fell through, however, and were replaced in the final treaty draft by an innocuous *vœu*: "The Conference expresses the opinion that the Powers should regulate by special treaties, the position as regards military charges, of foreigners residing within their territories." ⁸⁰

The United States, however, concluded only three more treaties after 1907 which contained mutual exemption from military service. One was a reenactment of the 1894 Japanese treaty when it came due in 1911.⁸¹ That is now abrogated. The others were Siamese treaties of 1920 and 1938, drawn on similar lines, and a hold-over from pre-war days.⁸² Every other treaty referring to the subject and that has been concluded since World War I has permitted the drafting of neutral aliens under specified conditions. That with Germany of December 8, 1923, which was the first of the new series, and seemingly the model of those subsequent to it, was in the following form:

In the event of war between either High Contracting Party and a third State, such Party may draft for compulsory military service nationals of the other having a permanent residence within its territories and who have formally according to its laws, declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent Party within sixty days after a declaration of war.⁸³

If the policy thus initiated marked an unexpected fulfillment of the Hague suggestions of 1907 that military service be regulated by special treaty arrangements, it manifested also appreciation by the United States of problems that might confront it in a future war. The Government of the United States was in fact endeavoring through the provisions quoted to put the strongest reasonable inducement before a large and numerous class of neutral aliens to enter its service, by demanding departure from its domain if relief from service were sought.⁸⁴

It may be observed that the new American treaty policy was not followed by other countries in arrangements to which the United States was not a party. Thus, many contemporaneous treaties provided mutual exemption

⁸⁰ This JOURNAL, Supp., Vol. 2 (1908), p. 113. The text of the *vœu* is given in 2 Scott, Acts and Documents of the Hague Conferences, 289.

⁸¹ 3 Malloy, 2713. Abrogated by United States action six months before Jan. 28, 1941.

⁸² U. S. Treaties, Vol. III, 2830; U. S. Treaty Series, No. 940.

⁸³ U. S. Treaties, Vol. IV, 4193. See in this connection J. W. Cutler, in this JOURNAL, Vol. 27 (1933), pp. 225, 232, who attributes the change in the treaty policy of the United States to the inter-Allied treaties concluded in 1918 with Great Britain, Canada, Greece, France and Italy. It may be greatly doubted whether these arrangements were influential in causing the United States to propose to Germany the text of the article quoted above.

⁸⁴ See Lincoln proclamation of May 8, 1863.

from military service.⁸⁵ The United States, however, followed the provisions of its treaty with Germany in treaties with Estonia, Hungary, Salvador, Honduras, Austria, Latvia, Norway, and Liberia.⁸⁶ In the Norwegian treaty, however, no departure was permitted an expatriated national of either country who had resumed residence in his native country.⁸⁷

It should be observed that Article 3 of the Convention on the Status of Aliens, signed at Havana in 1928, declared that "Foreigners may not be obliged to perform military service."⁸⁸ An interesting limitation on the right of exemption was included in the Central American Treaty of 1923, signed by Guatemala, Salvador, Honduras, Nicaragua, and Costa Rica, to the effect that

Those who are not naturalized shall at all times be exempt from all military service and they shall not be admitted into said military service without the previous consent of their government, except in case of international war with a country other than one of the Central American Republics.⁸⁹

The draft convention prepared at the League of Nations meeting on the Codification of International Law in 1930 exempted aliens from compulsory service in the armed forces, including the national guard and militia, but the convention was never ratified. The Harvard Draft avoids the issue, concentrating in Article 21 upon the related problem of requisition of property.⁹⁰

With the exception of the seven bilateral treaties concluded by the United States since the first World War, there has been no apparent tendency to confirm the military liability of resident alien neutrals. On the other hand, it has been impossible to obtain general agreement on a policy of exemption. The treaty policy of the United States as revealed in the arrangements concluded since World War I is perhaps self-explanatory. It is impressive in that it gives a loophole of escape from military service for the class of neutral aliens sought to be inducted. Again, the statutory policy of the United States is impressive because of the latitude yielded to the neutral alien. The only penalty he incurs for seeking release from service is loss of the privilege of acquiring American citizenship. He is given the option. The significant fact in the history of American draft legislation is that in the last analysis

⁸⁵ See, for example, Art. 7 of the treaty between Austria and China, ratified June 15, 1926, printed in this JOURNAL, Supp., Vol. 21 (1927), p. 55; Art. 7 of the treaty between Germany and Great Britain, ratified Sept. 8, 1925, in *ibid.*, Vol. 20 (1926), p. 86, (*cf.* U. S.-Germany treaty of 1923, below); Art. 12 of the treaty between Great Britain and Turkey, ratified Sept. 3, 1930, in *ibid.*, Vol. 27 (1933), p. 98; Art. 6 in the 4th Convention of the Treaty of Lausanne, signed July 24, 1923, in *ibid.*, Vol. 18 (1924), p. 69; and Central American Convention of 1923, signed Feb. 7, 1923, in *ibid.*, Vol. 17 (1923), p. 119.

⁸⁶ See U. S. Treaties, Vol. IV, 4107, 4320, 4617, 4308, 3932, 4402, 4529 and U. S. Treaty Series, No. 956.

⁸⁷ U. S. Treaties, Vol. IV, 4529. This provision was also included in the Liberian treaty.

⁸⁸ U. S. Treaties, Vol. IV, 4723. The United States declined to accept this article.

⁸⁹ This JOURNAL, Supp., Vol. 17 (1923), p. 119.

⁹⁰ League of Nations Document, C.97.M23.1930.II.5.

this option has never been denied. In a word, the United States has in substance merely asserted that military service is the price to be paid by the neutral national for the acquisition of American citizenship, and likewise the price to be paid for the privilege of permanent residence within American territory. No rule of international law intimates that the exaction of that price is wrongful. Finally, in its latest enactment, it has not even exacted that price for the privilege of continued residence within its domain.

COPYRIGHT IN WAR AND PEACE

BY WALLACE MCCLURE

When citizens of the United States propose a discussion of any subject of public policy which is specifically mentioned in the national Constitution, the constitutional provision is likely to be the most appropriate point of departure. The statesmen who framed the great charter of 1787 were on the alert in the public interest when, after providing that "All legislative Powers *herein granted* shall be vested in a Congress of the United States,"¹ they added that

The Congress shall have Power . . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.²

It was not to be presumed that, without a specific authorization, a legislature of restricted powers could deal with a subject of legislation so little developed as was copyright at that time, and it was definitely desirable that, if the growing desire for such protection was to be dealt with on a national scale, the correct direction should be clearly stipulated in the Constitution. This was satisfactorily accomplished. The unquestionable objective, in the event that the Congress should exercise its optional powers, was made the promotion of learning; the sole concern was that the public should be the beneficiary. A monopoly in the author was regarded as a means to that end; it was emphatically not an end in itself.

This choice of means was in accord with the philosophy as well as with the limited resources of the times. A national treasury competent to underwrite direct aid to education or to authorship was not then contemplated. There was wide acceptance of the doctrine that if individuals pursued their own self-interest the sum total of their efforts would redound to the general welfare. The public interest would be served if individual authors were accorded the means of effectually pursuing their own self-interest³ through monopoly profits because, so stimulated, persons of genius would, it was believed, put forth their greatest efforts and bring out their utmost in literary and artistic achievement to the good of the community at large. Manifestly it was the common good alone that was the stated objective of the legislation authorized but in no sense made mandatory.

¹ Const., I, 1. Italics not in original.

² Const., I, 8. See pertinent comment in U. S. Congress, House of Representatives, 60th Cong., 2d Sess., Rept. No. 2222, to accompany H. R. 28192, pp. 6-7. The bill referred to became the Copyright Act of 1909.

³ Said Madison, in *The Federalist* (No. XLIII), referring to the constitutional provision:

"The utility of this power will scarcely be questioned. The copyright of authors has been

A century and a half of experience may cast a doubt upon the continuing and unvarying validity of the philosophy of the constitutional provision and even more doubt upon the fidelity to its letter and spirit with which the Congress of the United States has seen fit to act upon its authorization. But doubt as to the wisdom of the choice of means casts no doubt upon the correctness of the objective. The constitutional aim of service exclusively to the public welfare remains a beacon light for the present, as for the past and for all the future.

Citation of letter and verse in existing legislation might well, indeed, challenge any connection with a constitutional authorization designed so to foster the protection of authors as to serve the cultural aspirations of the public. Similarly, much that is contained in or omitted from the existing statutory law of patents seems hardly defensible against the charge that it operates primarily for the benefit of, neither the inventor nor the public, but rather of corporate licensees who may suppress or restrict public use of the invention in order to prepare the way for economic power, including, doubtless, extravagant profits, or even for artificial scarcities, such as those which have proved so dangerous in the current war effort.⁴ However difficult and significant are the resulting basic problems in public policy, they must be passed over for present purposes if such purposes are confined to a brief study of the problem of copyright in its international phases now confronting the United States.

That problem derives particular current relevancy from the emergency created by world war and by the expectation of lasting settlements to follow; for it is evident that in the international sphere, as well as in the national, cleavages between the public interest and the alleged interests of private parties—interests of licensed purveyors of copyrighted works rather than the creators of such works—remain pronounced and sometimes gaping. It is, moreover, peculiarly true that in whatever affects international relations the public has a special and a preëempted interest over and above as well as accompanying its interest in the multiplication, whether at home or abroad, of genuine literary and artistic productions.

Internationally, copyright is subject to international law and that law is embodied in treaties which are the enactment of no single national legislative body, but of conferences of many nations, confirmed nationally indeed by national act, but not subservient to any one nation's law or policy. Nevertheless, it is reasonable to demand that, with respect to the negotia-

solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."

⁴ See U. S. Senate, Committee on Patents, 77th Cong., 2d Sess., Hearings on S. 2303, a bill to provide for the use of patents in the interest of national defense or the prosecution of the war, and for other purposes.

tion or acceptance of treaties, no less than to statutory laws which in the exercise of its own powers alone it enacts, the Government of the United States should shape its copyright policy in the spirit of the constitutional provision in relation to the promotion of fine art and to search carefully lest it fail to live up to its opportunities, lest by acts of omission it favor special interests, whether of creators or exploiters of literary and artistic works, at the expense of the public interest. The treaties that have in fact been laid before the Senate may with entire confidence be said to fulfill the constitutional policy of action solely in the public interest, but the record as a whole in this respect is not good.

More than a hundred years passed after the adoption of the Constitution before any international act was entered into by the United States Government for the protection of authorship. This neglect to promote literary and artistic creation in accordance with the philosophy of the Constitution beyond the jurisdiction of national legislation was not for want of example. Long before 1891 European countries had begun to conclude treaties of mutual protection and in the eighties a general convention, open to the adherence of the United States, had been adopted and earnestly brought to the attention of Congress in annual messages of the President. It was not for want of demand for such action by statesmen and authors throughout much of the nineteenth century. In then recent years authors, led by Mark Twain, not only sought protection for their works in other countries, but were consistent enough to desire to offer reciprocal protection in the United States to authors of other countries. It was not consistency alone, however, that urged such reciprocity: sound business acumen led to the realization that if local publishers could pirate and use free of royalty the works of European authors, the way to publication and profitable distribution at home of the works of American authors might suffer considerable eclipse—or at least notoriously unfair competition.

Assuming that the constitutional philosophy had any validity at all, the situation was such, indeed, as to furnish a perfect example of its potential capacity. If the international protection of copyright could promote culture by securing for limited times to United States authors protection in as many countries as possible, such protection to their colleagues in those countries by means of the exclusive right in the United States to their respective writings could contribute likewise to the enrichment of culture, with benefit to the public at home and abroad. Why did the Congress hesitate?

The reason is almost certainly to be found in the rather blatantly revealing provisions of the Act ⁵ which grudgingly initiated the first reciprocal arrangements with other nations. These arrangements for authors' protection were, indeed, in line with the policy of the Constitution in that they sought copyright monopoly for United States authors in other countries; but

⁵ Act of Mar. 3, 1891, Secs. 3 and 13 (26 Stat. 1106, 1107, 1110).

reciprocal protection in the United States could only be obtained on condition that for the most part copyrighted works should be manufactured in the United States. Thus, the text of a book published in another country would have to be re-set in type and wholly reproduced in this country or else be open to piracy by publishers here without any legal remedy by the holders of the violated copyright. Congress had ignored or forgotten the liberal policy of the Constitution and had bowed to pressure from publishers and typographical unions that was inimical to authors' interests and, in so far as protection of authors is synonymous with promotion of culture, inimical to the public interest also. Moreover, since such a policy necessarily resulted in the continuance of international friction and the disgust which accompanies manifestations of subserviency to ulterior motives, this one was inimical to that more important public interest which suffers from failure to promote the maximum of cordial relationships with other peoples by full and generous reciprocity in all international dealings.

Thus the international copyright relations of the United States got off to a singularly bad start. The characteristics of that commencement have bequeathed their influence to the present day.

Since 1931, when the President sent to the Senate, with request for consent to adherence thereto, the Convention for the Protection of Literary and Artistic Works, United States international copyright policy has revolved around the issues raised by this general copyright treaty.

During the generation and more which had passed since 1891, the manufacturing provision of the Act of that year had been slightly eased⁶ and the United States had become party to two Pan American conventions⁷ for the protection of copyright, as well as to several bilateral treaties and a large number of reciprocal arrangements in accordance with the provisions of the statutes. But copyright legislation, hardly altered since 1909, was distressingly inadequate in the face of those vast developments which brought the million-subscriber magazine, the motion picture, and the radio broadcaster into the pattern of copyright incidence. Copyright law remained practically unchanged while copyright policy came within the sphere of interest of immense economic enterprises which, in a new sense, connected the dissemination of creative culture with business executives who very emphatically conceived their foremost duty to consist in the accumulation of huge pecuniary returns to investors, regardless of whether they were creators of literary or artistic works.

The mechanical inventions which made these enterprises possible and the social developments which gave them their novel and unprecedented features combined to set the stage in 1931 for augmented conflicts of policy and of interest. The exploiters, the creators, and the public were still, indeed, the contestants, but with stakes vastly exceeding those of four decades before.

⁶ Act of March 4, 1909, Sec. 15 (35 Stat. 1075, 1078).

⁷ U. S. Treaty Series, Nos. 491 and 593.

For not only business organizations and profits, but authors' associations and royalties, had increased mightily in the intervening years, as had also the public concern with respect to culture and to good neighborliness in international relations. The issue remains undecided, perhaps in stalemate, as the overwhelming catastrophe of world wide battle at arms tends to submerge all other international issues.

Essentially the struggle which has evolved around the treaty—upon which, after eleven years, the Senate has not taken definitive action—grows out of the desire, on the one hand, of the exploiting businesses, of which the magazine publishers, the motion picture producers, and the radio broadcasters are the most powerful and most militant, for freedom to use the works of authors of other countries without any very exacting liability to ascertain whether those works are copyrighted, and the insistence, on the other hand, of government spokesmen that the public interest will be served by protecting authors, whether of this or other countries, by regularizing international cultural relations through copyright, and by confirming and developing international law and organization in this important sector of relations between peoples. The authors themselves have played a secondary rôle. Individual authors, and at least one authors' association, have, indeed, aided in every possible way the effort that has been made in their behalf. But other associations have conceived it preferable to sacrifice what they fully concede to be their self-interest in better international protection in order to enter into various working arrangements with interests which oppose the treaty.

The lines of causation back of these positions can be clarified by some account of the treaty itself.

The Convention for the Protection of Literary and Artistic Works, originally signed at Bern on September 9, 1886, has been thoroughly revised by succeeding general conferences, the latest being that of Rome, 1928.⁸ The United States Government has usually been represented at these conferences by observers who did not actively participate in negotiations. The Rome revision, having superseded among ratifying states the earlier versions of the treaty, was laid before the United States Senate in 1934. It has several times been reported favorably by the Foreign Relations Committee and once received the assent of the Senate, which latter action was, however, rescinded for further consideration because of certain arrangements which were deemed in honor binding upon individual Senators.

The essential principles which the treaty, if approved and adhered to would carry into the law of the land,⁹ are national treatment and copyright without formality. By national treatment is meant the guaranty that in

⁸ Congressional Record, Vol. 79, Pt. 6, p. 6028 (April 19, 1935), 74th Cong., 1st Sess. This instrument continues to be commonly referred to as the Bern Convention.

⁹ Const. VI. In this connection, see *Bacardi Corporation v. Domenech* (1940), 311 U. S. 150; this JOURNAL, Vol. 35 (1941), p. 383.

each country party to the treaty the authors of all the other participating countries shall enjoy the protection provided by law for authors who are citizens or who are within the domestic jurisdiction. By copyright without formality is meant copyright accruing to the author of a literary or artistic work by virtue of its creation alone, without any further action on his part. This "automatic" copyright is to be contrasted with copyright that accrues only after compliance with some formality or requirement of law. Thus the law of the United States requires generally that an author, in order to enjoy copyright in a literary or artistic work, must have published it with notice ¹⁰ that he wishes the copyright reserved—hence the familiar insertion of "Copyright" on the reverse of the title page of a book—and, as a condition precedent to bringing an action before the courts for protection against infringement, that he must register it at the Copyright Office and deposit copies with the Library of Congress. While the "formalities" of United States statute law are few and lightly to be borne, at least so far as authors residing in this country are concerned, and while copyright without formality may be said to be a part of the common law that is in force except where modified by the federal statute, the treaty would result in an important theoretical and a considerable practical change in the copyright law in force in this country. It should be borne in mind, however, that, of itself, the treaty would provide automatic copyright only for authors of other countries parties to the treaty, and not for authors within the domestic jurisdiction.

The effect of a grant of copyright without formality, or "automatic" copyright, to the authors of other countries parties to the treaty has, indeed, been imaginatively expanded by special consuming interests, and other stipulations of the treaty have been interpreted in the light of a similar fear-someness. But there is every reason to suppose that the net result of acceptance of the treaty by the United States would be definite augmentation of protection from the author's point of view, and that such statutory requirements as that the works of authors belonging to other countries parties to the treaty must be manufactured or remanufactured in the United States in order to be eligible to copyright would be regarded as wholly incompatible with and overruled by the treaty's obligations.

There are several details of the treaty that have been especially scrutinized for their possible effect upon current practices in the United States. A good example is the provision retaining for the author "the right to object to every deformation, mutilation or other modification" ¹¹ of his works, to be implemented in accordance with legislation in the separate countries. Is this "moral" right alienable by specific contract with an assignee or licensee of a copyright? Moreover, the specific inclusion within the treaty ¹² of pro-

¹⁰ Act of 1909, Sec. 9. *Washingtonian Publishing Co. v. Pearson, et al.* (1939), 306 U. S. 30.

¹¹ Art. 6 bis.

¹² Art. 2. See U. S. Senate, 77th Cong., 1st Sess., Ex. Rept. No. 1, p. 5, Jan. 16, 1941, Committee on Foreign Relations. Submitted by Mr. Thomas of Utah.

tection for "addresses" and other compositions of the mind that may be (but need not be) delivered by the spoken word without an accompanying inscription of any variety, has raised the question whether, if a song merely "breathed . . . into the air" found lodgment in some less scrupulous repository than "the heart of a friend" and was later copied, such act would be in violation of a right of him who "breathed" it. Furthermore the treaty¹³ provisions appear to include retroactively some works which, though in existence before the adherence of a country to the treaty, are not copyrighted in such country and hence, in a sense, may by the treaty be taken out of the public domain and given the protection of the newly-adhering country's laws.

Apparently no one objects to the provision of the treaty according national treatment to the authors of other countries. Pan American treaties¹⁴ and informal arrangements¹⁵ in accordance with the Acts of 1891 and of 1909 resulting reciprocally in such treatment are already in force with a considerable majority of other countries. But the reactions of the exploiting interests,¹⁶ the creators, and the public to automatic copyright, the manufacturing requirement, "moral" rights, "oral" copyright and retroactivity vary fundamentally. To all of these, except the manufacturing clause, most of the exploiters object because of the fear of increased difficulties in dealing with authors and obtaining clear and unassailable rights to use literary and artistic works as they see fit. The retention of the manufacturing clause is no longer insisted upon by publishers; the book publishers, indeed, maintain a generally favorable attitude toward the treaty. But the printing trades unions, while in many cases acknowledging the futility as well as the economic viciousness of the manufacturing clause, are disinclined to give it up. The authors, if correctly represented by one of their leading associations, while deploring this requirement, have been so anxious to play along with organized labor as to be willing to sacrifice their own known interests rather than insist upon what labor opposes. They desire, of course, the increased protection afforded by the treaty, including the provisions specifically discussed, and in earlier decades under different leadership were its foremost champions. While lukewarm toward the treaty, they are vigorous champions of automatic copyright as a matter of national law. They thus in a sense seek a whole loaf or none at all.

¹³ Art. 18.

¹⁴ U. S. Treaty Series, Nos. 491 and 593.

¹⁵ These arrangements are evidenced by presidential proclamations appearing currently in Statutes at Large.

¹⁶ This term is used in no opprobrious sense, but merely to connote, after the analogy of the exploiting of natural resources, the use of cultural resources for private profit of a purely commercial nature. Obviously those interests have made available for the public literary and artistic creations on an unprecedented scale and in a way which, despite gross abuses, not only makes possible magnificent cultural achievements, but actually results in educational values of the highest importance.

The public interest ¹⁷ with respect to the Convention for the Protection of Literary and Artistic Works would seem to be expressed as follows:

1. As to automatic copyright as an international policy, regardless of whether a country adopts it with respect to its own nationals, the affirmative argument is substantially the argument for copyright in general. In so far as copyright (with or without formalities as conditions precedent) promotes intelligence, it is in the public interest. Since compliance with formalities by persons resident in other countries is always likely to present difficulties, and as in time of emergency their suspension appears to be necessary if international copyright is to be maintained, it follows that the public interest is in favor of such a provision. That such is the general view is suggested by the fact that a large majority of the countries of the world have long accepted a treaty of which copyright without formality is the most distinctive and most important provision. The United States, in fulfilling its desire to assist in the development of orderly and effective international relations in the field of copyright, no less than in following the policy of its own Constitution, would seem clearly to be acting in the public welfare so far as this prime feature is concerned, as well as to be taking advantage of the one instrumentality available to it, should it adhere to the general convention.

2. As to the manufacturing requirement, no conceivable public interest could fail to be served by its elimination. So palpable an earmark of the dog-in-the-manger type of self-seeking is a discredit to any body politic. Moreover, it does not appear even to serve the unenlightened selfishness of its sponsors. A country which has now become a net exporter of copyrightable products is likely to provide more jobs by protecting its authors from piracy abroad than by requiring other countries' authors to manufacture their books and certain other creations within the national borders. Its invalidity as a protector of labor interests is suggested by the tendency of representatives of labor to use it as a bargaining device in dealing with interests that desire its abolition rather than as a principle which must be maintained because of its inherent value. Present day arrangements between publishers usually result in American editions of important works regardless of it, and modern processes of reproduction have taken away much of its make-work capacity. Work merely for work's sake does not increase a country's wealth and standard of living. Economically false, the manufacturing requirement is culturally perverted. But the clause remains a rider dedicated to private greed, wholly irrelevant to and inconsistent with a measure enacted under a constitutional authorization to promote higher arts. Surely here the Congress has dragged down to its most abysmal nadir the policy of the Constitution that copyright legislation should be

¹⁷ For an attempt to show that the adoption of the treaty would in reality operate for the benefit of all interests, even the special interests opposing it, see U. S. Senate, Committee on Foreign Relations, 77th Cong., 1st Sess., Hearings before a subcommittee on Ex. E, 73d Cong., pp. 185-186.

used for the public welfare. The evil principle of the manufacturing provision remains to vex international relations and disgust honest men. If the treaty made no other contribution than the repeal of this stupid anachronism, it should be adopted in the public interest of the people of the United States.

3. As to the author's "moral" right, it is obviously in the public interest that the cultural value of literature and art be maintained at the highest attainable point. While publishers, motion picture producers, and those who convert such works into form suitable for dramatic or radio presentation may improve upon the original author's ideas, the interests of the public seem to favor his control, but not such rigid and inalienable control as to encourage eccentric claims against capable and conscientious exploiters. The treaty¹⁸ does not appear to preclude reasonable contracts between creator and exploiter, and it leaves individual countries parties largely free to interpret it severally in accordance with their national policies. Adherence to the treaty would almost certainly leave the existing common law in force in the United States without any appreciable change.¹⁹

4. As to "oral" copyright, it is clear that the public interest knows no relationship to such indefinable productions of the mind as the authors thereof do not reduce to something that under the Constitution may be termed a "writing." But neither is there any reason to believe that anything not a "writing" is required to be copyrighted by virtue of the treaty.²⁰ The records of the conference which framed the treaty, reinforced by common sense, belie the fears of exploiting interests lest authors may arise to sue them for appropriating works that have been voiced but not stated by such authors in lasting form. There is clearly no occasion at this point to reject an instrument otherwise attuned to the public interest.

5. As to retroactivity, the treaty²¹ appears to provide that a country adhering to it shall protect copyright in works that remain protected in the other countries parties, though created before the date of adherence, subject to a flexible right of application in accordance with national legislation. This provision, like everything in the treaty, is reciprocal and would result in immediate and automatic copyright for many United States works not theretofore copyrighted in other countries, while making it incumbent upon exploiters in this country to take care lest they infringe rights that theretofore had not been legalized here. The danger to exploiting interests may easily be exaggerated, as in all probability most works that are likely to be of considerable commercial value in this country will have been copyrighted here regardless of the treaty. The public does not seem likely to be deprived of any long-run cultural values by the necessity that exploiters avoid reproduction of literary and artistic works unless and until they can obtain

¹⁸ Art. 6 bis.

¹⁹ See U. S. Senate, 77th Cong., 1st Sess., Ex. Rept. No. 1, p. 5.

²⁰ Art. 2.

²¹ Art. 18. See also Art. 13. U. S. Senate, 77th Cong., 1st Sess., Ex. Rept. No. 1, p. 5.

the author's permission; on the other hand, if that interest is in general served by copyright protection, so natural and logical an extension of it, alike to national authors and to authors of other countries, would seem to enhance that service. There seems to be no likelihood whatever of any injury or deprivation to exploiters who are willing fully and faithfully to respect authors' rights. The idea that any considerable proportion of needed works will long be inaccessible to them because of inability to contact the authors seems very highly imaginary.

While the foregoing paragraphs are believed to set forth all of the essential considerations connected with the proposal to adhere to the copyright treaty, there are, needless to say, contentious related points: for instance, whether the adoption of the treaty should be preceded by alteration of the national statutory law so as to conform to it and implement it. Accompanying legislation would unquestionably be appropriate, but there is little if any dissent from the proposition that the treaty is complete in itself and can be executed as law without the assistance of the legislative branch of the government.

For twenty years repeated efforts have been made, on the basis of repeated exhaustive hearings before Congressional committees, to alter the national statute in the direction of harmony with the treaty. All have broken on the rock of uncompromising intransigence of authors' and exploiters' organizations, often having little or no connection with international copyright policy. An excellent example is the provision of the statute fixing a minimum of \$250 as the award in a successful infringement suit, regardless of the real extent of the injury suffered. Enacted as a strong-arm remedy against blatant piracy, it may have been justifiable when the trouble and expense accruing to an author acting for himself alone in bringing legal action would often have been prohibitive unless, in the event of recovery, something more than the actual damage was made mandatory upon the courts. But with the growth of authors' organizations, with legal staffs and with numerous retained counsel scattered over the country, and with modern means for multiplied performance of musical works, this statutory damage provision assumed the characteristics less of a preventive of infringement than an instrumentality of oppression and became a business asset capable of determining charges made by copyright assignees for public presentation of literary and artistic works. Surely here, if anywhere, reasonable compromise ought to be practicable, but no issue has been approached in a more dogmatic spirit.

The only way that the log-jam seems likely ever to be broken is by the genuine invocation of the public interest. When there is full recognition of the existence of a public interest in copyright, independent of the conflicting interests of creators and exploiters, the way to the enactment of a just law will not be hard.

That minimum statutory damages and numerous other bones of conten-

tion, gnawed over by the legislative counsel of vast business enterprises—far removed indeed from the springs of creative genius out of which a nation's culture is developed and science and the useful arts are promoted,—prevent as a practical matter the modernization of the copyright law is shown by a significant recent experience. Noting that hearings before Congressional committees had degenerated into mere occasions for oratorical and forensic displays between representatives of opposing private interests whose retainers might cease if efforts to obtain legislation should be successful, the National Committee of the United States on International Intellectual Coöperation set up a Committee for the Study of Copyright and invited representatives of the leading special interests to meet under its auspices quietly and in private with the idea of calmly discussing honest differences and arriving at honest compromises. Notwithstanding admirable leadership by the committee, the result was hardly different from the efforts made in committees of Congress: a praiseworthy bill was drafted, and even introduced into the Senate,²² but without the backing of the interests concerned. Congress, inert between the opposing pressures, has given the bill even less consideration than its long line of notable predecessors.

The result is that, if the pending treaty is needed in the public interest—and on every count such is believed to be the case—it should be approved by the Senate without waiting for the enactment of legislation. Its adoption would be a most convincing sign that the public interest can prevail over private conceptions of special interest. In the light of actual experience with the treaty, a more intelligent approach can be made to the problem of the reform of the national copyright law,²³ and such piecemeal amendments of the statute can be effected as from time to time are demonstrated to be necessary or desirable.

The cleavage between warring private interests, on the one hand, and, on the other, the presentation of the matter by persons without personal financial interest in it, and earnestly endeavoring to assess accurately and represent intelligently the interest of the people as a whole, was even more recently demonstrated in an experience of the American Bar Association. The protection of authors' rights and the promotion thereby of science and useful arts had for many years been a subject of discussion and resolution in the Section of Patent, Trade-Mark and Copyright Law, the attitude of which toward positive international policies was likely to be inconclusive or condemnatory. At the annual meeting of 1941, the Section of International

²² S. 3043, 76th Cong., 3d Sess., Jan. 8, 1940.

²³ At the hearings on the treaty in 1941, Dr. Waldo G. Leland, Chairman, The Committee for the Study of Copyright, said: "The Committee for the Study of Copyright which is concerned only for the public interest broadly interpreted, is convinced that, immediately upon the ratification of the convention, the necessary legislation can be offered in a form that will be generally acceptable and can be adopted without the conflict of interests that has characterized and frustrated previous efforts to reform our copyright law." *Hearings, loc. cit.*, p. 46.

and Comparative Law brought before the House of Delegates a forthright resolution favoring immediate adherence by the United States to the Convention for the Protection of Literary and Artistic Works.²⁴ Difference of opinion and conflict of jurisdiction as between the two sections led the House of Delegates to resubmit the resolution and instruct the Section of International and Comparative Law to discuss it with the Section of Patent, Trade-Mark and Copyright Law. For purposes of this discussion the Chairman of the latter Section appointed three able members all of whom were of counsel for important exploiting interests and all of whom in that capacity had appeared before committees of Congress in opposition to the treaty. The Chairman of the other Section appointed members all of whom were public officials and consequently in duty bound to stand by the interests of the public. Needless to say the discussions did not lead to an agreement.²⁵

Perhaps the favorite argument of those who oppose adherence to the treaty is that now is not the time. In war we must wait for peace; in periods of emergency we must wait for eras of calm; when there is depression we must await prosperity. In normal times (if any there be) we must wait for a more auspicious moment. This attitude was not wanting at the most recent hearings on the treaty held by a Congressional committee.

A subcommittee of the Committee on Foreign Relations of the Senate, latterly under the wise and patient leadership of Senator Thomas of Utah,²⁶ has for years sought to resolve the question of the treaty. Although it was difficult to conceive of anything that had not already been reiterated in many previous hearings, the claim of promise to certain special interests that they again be heard was honored, and two days, April 15 and 17, 1941, were devoted to the purpose. Much old stuff cropped out anew. There was, for instance, the old effort to appeal to prejudice against the "foreigner." There were racial arguments and attempts to show the Convention would operate for the benefit of Powers unpopular in the United States. Vague demands for reservations, wholly impractical to attain, were again put forth. Most striking of all, perhaps, was further revelation of the haziness of spokesmen for labor regarding the nature of copyright in relation to the manufacturing requirement which they continued to defend. Thus the representative of the International Allied Printing Trades Association, spoke of "foreign

²⁴ Reports of American Bar Association, Vol. 66 (1941), pp. 156-158.

²⁵ This is indeed a pathetic commentary. There is every reason to believe that a well-nigh complete unity of interest exists and that not only would no interest, private or public, suffer from the adoption of the treaty, but that all would gain advantage from such step. See *supra*, footnote 17.

²⁶ A Vice-President of the American Society of International Law. The former chairman of the subcommittee was Senator Duffy, of Wisconsin, whose accompanying bill for the general reform of the copyright laws achieved the unique distinction of being the only such bill, since the treaty was sent to the Senate, to be passed by that body. It was not acted upon by the House. Some years before the Vestal Bill, approved by the House, had died in the Senate.

authors," in the event of the abrogation of the requirement, getting "access to our market without producing their books in this country," and of the unreasonableness of turning "that market over to foreign authors who not only know more about what is happening now but who could have the added advantage of printing their works at a fraction of the cost of manufacture in this country."²⁷

Now whatever the merits or demerits of the manufacturing requirement in United States national law, it has nothing directly to do with international trade. No law or regulation of international interchange differentiates between printed matter that is copyrighted and printed matter that is not. Uncopyrighted works of British authors manufactured in Britain, or anywhere else, enter and circulate in the United States just as freely as, perhaps sometimes more freely than, they would if they were copyrighted here. There is no obstacle at the customs house to the importation of uncopyrighted works. The one difference is that if piracy takes place, the British author or other author of a work in English has no remedy. The cost of the printing (asserted to be less in Europe than in the United States) seems equally irrelevant to the question of copyright. Whether the remainder of the quoted passage was intended to intimate (not too delicately) that the United States authors are less *knowing* than their contemporaries abroad, and hence need to be *protected* against competition from them, the reader's guess is as good as the writer's.

In contrast with the special interests, a comparatively new and challenging note was sounded on behalf of the public interest, particularly by Assistant Secretary of State Breckinridge Long, who concluded his testimony as follows:

The convention before you recognizes the universality of culture because it is open to universal adherence, but it is equally applicable to whatever groups of countries may desire to improve their group relations by becoming parties to it. Its universal potentialities are likely to recommend it to groups who wish to see culture develop naturally and not in any sense to be regionalized.

We hope you will give your approval to the pending convention for another reason pertinent to the present crisis in affairs. As Secretary Hull said in a communication to the chairman of this subcommittee some time ago, it "fits definitely into the program of endeavoring to build up, step by step, better international relations in general. I am convinced that thus to take advantage of opportunities for the betterment of details is a particularly appropriate way for democratic peoples to make their influence effective, and that, in a world torn by destructive efforts, we should let pass no occasion which offers a chance to achieve constructive results. Failure of the United States to become a party to this convention has not only left the door open for injustices to its citizens and for obstacles to the right kind of cultural progress, but for ill feeling on the part of literary and artistic workers in other countries, notably the English-speaking countries."

²⁷ Hearings, *loc. cit.*, pp. 162, 163-164.

The present is not a time when we can afford to neglect any opportunity, even in a limited field, to overcome disorder by order, replace chaos with law—set up a regular order of procedure.²⁸

While considerations of space preclude mention of numerous not unimportant details, the foregoing is believed to present a fair picture of by far the most important elements of the copyright picture as it confronts the United States in the summer of 1942. But, aside from the general treaty itself, there are accompanying aspects of the problem that must be considered.

Like the general international copyright question, there has long been pending and yearly becoming more acute the special question of protection of authors and public interests throughout the countries of the Pan American Union. The treaties and agreements in effect among certain of these countries, while on their face possessing many virtues, have not in practice demonstrated any high degree of capacity to provide adequate international protection for the creative genius of countries in recent times more than ever committed to policies of cultural coöperation. Accordingly, the Eighth International Conference of American States, meeting at Lima in 1938,²⁹ taking note of a resolution and draft protocol prepared by the National Committee of the United States on International Intellectual Coöperation, instructed the Pan American Union to submit these instruments to the governments of the twenty-one republics, and, having received these governments' observations regarding them, to make them the basis of a definitive convention. Such convention may be opened for signature by the Pan American Union or submitted to a special conference or to the Ninth International Conference of American States. In the early summer of 1942 the Union had not completed a definitive draft, but correspondence with the member governments had been carried on and much careful attention given to the matter.

The presence of world war, while doubtless contributing to delay, had also clearly increased the need for regularization and standardization of international law and order with respect to copyright as with respect to all other subjects of inter-American interest. The United States, the President of which has urged and continues to advocate adherence; Brazil and Haiti, which have long been parties; those other American Republics, particularly Uruguay, which have given much favorable consideration to the Convention for the Protection of Literary and Artistic Works; and Argentina, which has adopted an admirable national law conforming to its most essential features, must necessarily be influenced by their status with respect to the general treaty in developing their policies relating to Pan American arrangements designed to meet Pan American problems. Canada and most of the colonial areas of the Americas are parties of long standing.

²⁸ Hearings, *loc. cit.*, p. 36.

²⁹ Final Act, Resolution XXXIX.

Meanwhile, the world political emergency, which after rapid worsening since the low point of the world economic depression a decade ago became cataclysmic with the events of September 3, 1939, has resulted in legislation in the United States which, following precedents of World War I, is of very direct and palpable concern in a study of copyright in wartime. The value to authors of copyright without formality is never so much appreciated as when interference with communication between nations, such as results from blockades, censorships, and the destruction or threat of destruction of the vessels of aviation and navigation, delays or prevents compliance with the various and varying requirements of the copyright laws of the several countries in which the assurance of copyright is desired and sought.

With a view to the alleviation of the injury to the creators of literary and artistic works growing out of the war situation, the Congress passed an Act, approved September 25, 1941,³⁰ providing that in case authors or their assignees had been or should be "temporarily unable to comply with the conditions and formalities" prescribed by the United States statute "because of the disruption or suspension of facilities essential for such compliance," an appropriate extension of time³¹ for fulfillment might be granted by the President. The operation of the Act with respect to the authors of any particular country depends upon the willingness of that country to grant reciprocal treatment to United States authors. The existence of such reciprocity is to be determined by the President and evidenced by his proclamation.

While as late as mid-June, 1942, no proclamation had been issued and no reciprocal agreement had been reached with any other country, the significance of the enactment is real, and it has a real importance as showing the need for general international legislation for the protection of authors in periods of war, and in demonstrating afresh the advisability of abolishing formalities altogether as a condition precedent to copyright. Were the Convention for the Protection of Literary and Artistic Works in force as to the United States, this country's authors would be amply protected in forty-odd other countries parties without the need of negotiating agreements in the midst of the chaotic conditions produced by war.³²

There is also a connection of importance with respect to copyright without formality in the second of the two specific wartime measures now affecting the copyright problem in the United States, that is, the granting of power to the Alien Property Custodian to be vested with alien-held copyrights. By Executive Order No. 9095, March 11, 1942, based on the First War Powers Act, 1941,³³ the Office of the Alien Property Custodian was established in the Office for Emergency Management of the Executive Office of

³⁰ 55 Stat. 732. For corresponding Act of World War I period, see 41 Stat. 368.

³¹ The Act of 1941 also provides for extension of time for renewal of copyright.

³² See U. S. Senate, 77th Cong., 1st Sess., Ex. Rept. No. 1, pp. 1-2.

³³ 55 Stat. 838. Approved Dec. 18, 1941.

the President. Already a number of copyrights have vested in the Custodian, and the number that may legally be so vested appears to be limited only by the number of United States copyrights owned by persons who are not nationals of the United States. Whether it will be the policy of the Alien Property Custodian to make wide use of his powers or confine such use to needs growing directly out of war requirements, is not known. Examples of the latter type of policy would be found in the vesting of medical books that might be usefully copied for the hospital services of United Nations' armed forces. Examples of the broader policy might occur if, with an eye to cultural development and the uninterrupted promotion of learning, the Custodian should become vested with miscellaneous copyrights belonging to persons not in the United States with whom United States educational or exploiting interests might not, in wartime, possess means of making contact.

Should the Convention for the Protection of Literary and Artistic Works come into operation as to the United States during the course of the war, there would, presumably, be copyrighted in the United States certain existing works not theretofore enjoying copyright here, and new works would be created which perhaps, except for the treaty, would not be copyrighted in this country. In other words, works automatically copyrighted in the United States by virtue of the treaty would, it may be confidently assumed, fall under the jurisdiction of the Alien Property Custodian, and could be vested in him with right to license their use to publishers and producers generally. Reciprocally, of course, creations of American authors would be automatically copyrighted in other countries; but without copyright, they could be pirated whenever and wherever desired.

The realistic element of the situation would, accordingly, seem to be that the procedure of vesting copyright in the Alien Property Custodian could be utilized for an orderly international user of cultural works at a time when private parties might not be able because of the chaos of war to communicate with one another. Assuming that the policy would include some arrangement for return of the copyrights at the close of hostilities⁴⁴ and, where just, something in the way of compensation, authors, no less than the public, might benefit by the multiplication and dissemination of their works thus made practicable.⁴⁵

⁴⁴ Concerning the disposition of holdings of Alien Property Custodian following World War I, see *Foreign Relations of the United States, 1927, Vol. I*, pp. 301-308. For mention in an interesting connection of the question whether a patent (or copyright) is "property" in the sense of the Fifth Amendment to the Constitution of the United States, hence that the monopoly is irrevocable by Congress, see U. S. Senate, Committee on Patents, 77th Cong., 2d Sess., Hearings on S. 2308, Pt. 1, p. 34, April 14, 1942.

⁴⁵ Whether the convention, which is a general multipartite treaty, if now adhered to by the United States, would be in force or in suspense for the duration of the war as between the United States and those countries with which it is at war, is a question of extreme nicety and difficulty. It would certainly be in force, however, as to other countries parties and the

It appears, therefore, that the question of the approval by the Senate of the Convention for the Protection of Literary and Artistic Works is one that touches every phase of international copyright policy in wartime as well as in peacetime. It is believed to be the central issue in copyright in the United States the affirmative solution of which would assist in the solution of all other problems of this nature, aid materially in all phases of the promotion of the arts, and advance the general policy of international cultural interchange.

But an even more compelling reason for immediate action by the Senate is that any act strengthening orderly international procedure in accordance with law is an act that ought not to be neglected but expedited as a means of restoring and maintaining peaceful and profitable relationships between nations. Not the least significant feature of the general copyright treaty is its permanent administrative bureau and provision for recurring international conferences to consider and improve the protection of the creators of literary and artistic works. In its field this union of nations, set up by treaty, is an old and conservative political mechanism which forms a reliable precedent for developments covering functions of greater moment.

"In time of war prepare for peace." At the close of armed hostilities the cry for order under law should be paramount. What the Department of State has needed that it might effectually protect the rights of this country's authors in other countries, what a fair reciprocity has long required in order that there should be adequate protection for others here, will be thrice blessed if it is already adopted and reduced to current use when the firing ceases. At a time when all brains and all energies will be needed to solve unforeseeable problems, the fact of having taken the big step toward solving the problem of international copyright will be of genuine advantage. When the time comes to amend international copyright law through further revision of the Convention for the Protection of Literary and Artistic Works, the United States Government will be in a position to know from experience what changes it will advocate. Meanwhile it will enjoy the advantages of the treaty and opportunity to induce other nations not already parties to accept it also.

There are not many instrumentalities of adjustment now open to definitive adoption by act of national government. This treaty, though not looming large in the totality of world affairs, is in no sense lacking in importance. Thoroughly tried for over half a century and found acceptable to most of the world, its adoption by the United States now would be accounted an initial step in post-war settlements, an act of worthy international collaboration and support of international organization, a measure for the unification and wider application of international law, and a statesmanlike move to promote science and the useful arts temporarily in war, permanently in peace.

powers of the Alien Property Custodian are not limited to the investiture of copyrights of enemy nationals.

THE NORTH PACIFIC FISHERIES

BY GORDON IRELAND

When the time comes for the representatives of Japan to face those of China, Great Britain, Holland, Mexico and the United States across a table, to drive the best bargain they can for the continued national life of their island empire in the Pacific, one of the questions to be settled will be the control of the fisheries. Given the tremendous importance of fish in the food and economy of Japan, it will be a fundamental and vital question; and it would seem that for any thorough-going settlement the Soviet Union, with its shores on the Pacific, should be invited to participate in the discussion, if indeed by that time it has not actually gone to war with Japan. A brief review of the history of the problem may be of interest now and helpful to a better understanding later.

I. FUR SEAL PROTECTION

Emperor Paul I of Russia by an imperial ukase of July 8, 1799, granted the Russian-American Company various rights of hunting and fishing in the northeastern seas, and along the coast of America, from 55° to Bering Strait. Emperor Alexander I, by a ukase of September 7, 1821, approved for the company, and exclusively for Russian subjects, "the pursuits of commerce, whaling and fishing and of all other industry, on all islands, ports, and gulfs, including the whole of the northwest coast of America, beginning from Bering's Strait to 51° N. lat.; also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands, from Bering's Strait to the south cape of the island of Urup, *viz.*, to 45° 50' N. lat.;" and all foreign vessels were forbidden, except in case of distress, to land on the coasts and islands belonging to Russia or even to approach them within less than 100 Italian miles. John Quincy Adams, United States Secretary of State, protested on February 25, 1822, against the claim to exclude vessels of United States citizens beyond the ordinary distance to which territorial jurisdiction extends.¹ Great Britain also protested, and following negotiations at St. Petersburg, Russia entered into conventions with the United States, April 17, 1824, and with Great Britain, February 28, 1825, by which it was agreed that in any part of the Pacific Ocean the respective citizens or subjects of the parties should not be disturbed or restrained in navigation or in fishing, except at points where there were Russian establishments. In 1835 Russia began a policy of conservation of the fur seals in her Alaskan waters, imposing a closed season for fifteen years, to 1850, and then allowed only two and three year old bulls to be taken, until 1867.

¹ 1 Moore, *International Arbitrations* (1898), 755; 1 Moore, *Digest of International Law* (1906), 890.

By the Seward Convention signed at Washington, March 30, 1867,² Emperor Alexander II sold to the United States for \$7,200,000 in gold all the territory and dominions which he possessed on the continent of America and in the adjacent islands; with the western boundary running down a meridian from the Arctic Ocean midway between Krusenstern or Ignalook Island and Ratmanoff or Noonarbook Island of the Diomedes group as far as 65° 30' N. lat., thence southwest through Bering's Straits and Bering's Sea to pass midway between the northwest point of St. Lawrence Island and the southeast point of Cape Choukotski in Siberia, to 172° W. long., thence southwesterly to pass midway between Attu (the westernmost of the Aleutian Islands, 700 miles from Japan, and Medni (Copper) Island in the Komandorski group to 193° W. long.

From 1870 the United States leased to commercial companies the privilege of taking fur seals³ on the Pribilof Islands. Meanwhile there was pelagic hunting by numerous vessels, and from September, 1886, to February, 1887, various British Columbian sealing schooners were seized in Bering Sea east of the Russian boundary line, brought into Sitka, and ordered forfeited and sold and their officers imprisoned and fined by the United States court there, for violation of territorial statutes against the killing of fur-bearing animals, on the theory of *mare clausum*. Great Britain protested the seizures and the United States ordered the discontinuance of such proceedings, but invited France, Great Britain, Germany, Japan, Russia, and Sweden and Norway to coöperate for the better protection of the fur seal fisheries in Bering Sea. A convention was virtually agreed upon with Great Britain and Russia, when negotiations were suspended by Great Britain on May 16, 1888, at the request of the Canadian Government,⁴ without whose concurrence, which could not then reasonably be expected, Great Britain would not sign any treaty on the subject. Seizures of Canadian vessels in the open waters of Bering Sea began again by the United States in 1889, and a long and at times acrimonious diplomatic correspondence with Great Britain followed. Secretary of State James G. Blaine asserted that the pursuit and killing of fur seals in Bering Sea was, from the point of view of international morality, an offense *contra bonos mores*, and Lord Salisbury maintained that it was not so until there had been some special international arrangement to forbid it, as fur seals were indisputably *ferae naturae* and *res nullius* until caught. A *modus vivendi* was agreed to on June 15, 1891, by which Great Britain undertook to prohibit until May, 1892, any killing of seals by British subjects in Bering Sea east of the Russian boundary

² Gordon Ireland, *Boundaries, Possessions and Conflicts in Central and North America and the Caribbean* (1941), 290.

³ *Callorhinus*: Alascanus, from the Pribilof Islands, Kurilensis from the Robben (Tuleni) and Kurile Islands region, and Ursinus from the Komandorski Islands and along the Asiatic Coast.

⁴ U. S. Foreign Relations, 1888, II, 1842; this JOURNAL, Vol. 1 (1907), p. 742.

line, and the United States to prohibit such killing by United States citizens in the same part of the sea or on the islands, except 7,500 for the subsistence of the natives.

A treaty of arbitration was signed at Washington February 29, 1892,⁵ by which it was agreed that a tribunal of seven should decide five specified questions, and if the concurrence of Great Britain should be found necessary for the proper protection of the fur seal, establish suitable regulations therefor. On April 18, 1892, the *modus vivendi* was extended to the end of the arbitration. The arbitrators (two each from Great Britain and the United States, one each from France, Italy and Sweden and Norway) sat at Paris from February 23 to July 8, 1893.

The United States maintained that Bering Sea was not included historically in the Pacific Ocean; that Russia had asserted and maintained exclusive rights, under a strict colonial system, in fishing and hunting in and around Bering Sea, so that British subjects and vessels were excluded, until the sale of Alaska in 1867; and that all Russia's exclusive rights had been ceded and transferred to and thereafter asserted by the United States. Moreover, the United States declared, where by the art and industry of man, in the exercise of husbandry, wild animals are made to return to a particular place to such an extent that the possessor of the place can deal with them as if they were domestic animals, his property in them continues, no matter how far away they go, so long as they have the intention of returning; therefore the United States had a right of protection and property, coupled with a trust for mankind, in the fur seals frequenting the Pribilof Islands, when found outside the ordinary three-mile limit, based upon the established principles of the common and the civil law, upon the practice of nations, upon the laws of natural history and upon the common interests of mankind.

Great Britain pointed out that Bering Sea was no *mare clausum* but the common highway to the fisheries in the Arctic Ocean and to the northern British possessions in the Yukon and on the Mackenzie, and was an open sea in which all nations of the world had the right to navigate and fish, notwithstanding any supposed attempted exclusion by Russia or, since 1881, by the United States; that the claim of property in and a right to protect the fur seals outside the three-mile limit was entirely without precedent and in contradiction of the position of the United States on other occasions, as during the Franco-British war in 1804, in 1812, and in the incidents at the Falkland Islands in 1831;⁶ and that there was no right of property in and hence no right of protection over the fur seals at sea.

The Tribunal deliberated behind closed doors from July 10 to August 15, 1893, when it handed down its award.⁷ Deciding that the United States had

⁵ This JOURNAL, Supp., Vol. 6-(1912), p. 72.

⁶ See Gordon Ireland, *Boundaries, Possessions and Conflicts in South America* (1938), 256.

⁷ *Tribunal Arbitral des Pêcheries de Behring; Sentence, Déclarations et Protocoles des*

not any right of protection or property in the fur seals when they were found outside the ordinary three-mile limit, the Tribunal established a set of regulations which it deemed necessary for the proper protection and preservation of the fur seals in or habitually resorting to Bering Sea. Damages for the prior seizures of British vessels were left to two commissioners, and the United States on June 16, 1898, paid the sum they found due. Both nations passed laws in April, 1894, to carry into effect the regulations, which forbade killing or pursuit at any time within a zone of sixty geographical miles around the Pribilof Islands, and from May 1 to July 31, inclusive, on the high sea north of 35° N. lat. and east of 180° W. long. to the boundary line and on that line up to Bering Strait. France and Portugal signified their willingness to adhere to them. Japan agreed to take measures to prevent foreign vessels from using the flag of Japan to evade the regulations, but declined to require Japanese vessels to observe them unless similar protection should be given to Japanese seal fisheries. Japanese sealers began pelagic hunting in Bering Sea about 1901.

Russia agreed to adhere to the regulations only if they should be extended to the whole Pacific north of 35°, but the United States would not consent to such extension of application of the award. In the summer of 1888 Russian cruisers had seized the British Columbian schooner *Araunah* for taking seals in Bering Sea, and in 1891-92 Russia seized six more British vessels and six United States ships, apparently more than three but less than twelve miles off the Russian coast. In February, 1893, Russia prohibited sealing within ten marine miles of all her coasts and within thirty marine miles of the Komandorski Islands and Tuleni (Robben) Island.⁸ In May, 1893, Great Britain made an agreement with Russia to cause British vessels to respect these protected zones; and on May 4, 1894,⁹ the United States concluded with Russia a *modus vivendi* to the same effect for United States citizens and vessels.¹⁰ In the subsequent arbitration of damages for the earlier seizures of United States ships, which Russia agreed to, and whose awards she paid, the United States agent, Herbert H. Peirce, by specific authority of Secretary of State John Hay, on July 4, 1902,¹¹ declared that the United States claimed, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than three marine miles from its shores.

In April, 1897, the United States asked Great Britain, Japan and Russia to attend a conference to consider the measures necessary for the better

Séances (Paris, 1894); 1 Moore, *International Arbitrations*, 935; 1 Moore, *Digest of International Law*, 910; this JOURNAL, Vol. 6 (1912), p. 233.

⁸ Sherman Strong Hayden, *The International Protection of Wild Life* (New York, 1942), 132.

⁹ 28 U. S. Statutes at Large, 1202. 30 U. S. Stat., 226, 1253, 1279; 36 U. S. Stat., 326; 1 Moore, *Digest of International Law*, 908, 923.

¹⁰ *The Tenryu Maru* (1910), 4 Alaska, 129.

¹¹ U. S. Foreign Relations, 1902, Appendix I, 440; 1 Moore, *Digest of International Law*, 928.

protection of the fur seals. Great Britain declined to meet with representatives of Russia and Japan, but those two and the United States signed at Washington, October 6, 1897, a treaty prohibiting the killing of fur seals in the North Pacific Ocean outside of territorial limits for one year. The treaty was not to become effective unless Great Britain adhered, which she declined to do, so the treaty never went into force. After vainly endeavoring to come to an agreement with Great Britain, especially in 1898 and 1903, with the increasing hunting by Japanese pelagic sealers of the American herd in Bering Sea, the United States on January 21, 1909, again invited Great Britain, Japan and Russia to a conference. Japan and Russia accepted, but Great Britain, in accordance with the wishes of the Canadian Government, insisted that a separate settlement of the Canadian interests should first be agreed upon between Great Britain and the United States. After two years of negotiations, the two countries signed at Washington on February 7, 1911,¹² a treaty which prohibited the citizens and subjects of each party and their vessels from engaging in pelagic sealing in that part of Bering Sea and the North Pacific Ocean north of 35° N. lat. and east of 180° long., with the right of capture of violators by proper officers of either party, to be turned over to their own nation; the United States to deliver at the end of each season to a Canadian agent one-fifth in number and value of the sealskins taken annually upon the Pribilof Islands, and to pay Great Britain at once \$200,000 as an advance payment in lieu of such number of fur sealskins, and not less than 1,000 skins per year or \$10,000 annually. This treaty was to last fifteen years and go into effect when an international agreement should be concluded and ratified by the United States, Great Britain, Japan and Russia.

The conference of the four Powers was then assembled at Washington, and resulted in the signature on July 7, 1911,¹³ of a convention which prohibited the citizens and subjects of each party and their vessels from engaging in pelagic sealing in the North Pacific Ocean north of 30° N. lat. and including Bering, Kamchatka, Okhotsk and Japan Seas, with the right of capture of violators by proper officers of any party, except within the territorial jurisdiction of any party, to be delivered to their own nation; Indians and other aborigines in their own small kayaks, bidarkas or canoes exempted; each party not to permit its citizens or subjects or their vessels to kill or pursue sea otters more than three miles from shore; the United States, Japan and Russia each to maintain a guard or patrol in the waters frequented by the seal herd in the protection of which it was especially interested; the convention to supersede, so far as inconsistent, the United States-Great Britain treaty of February 7, 1911; to go into effect December 15, 1911, and continue in force for 15 years and thereafter until terminated by twelve months' written notice given by one or more of the parties to all the others. The

¹² 37 U. S. Stat., 1539.

¹³ 37 U. S. Stat., 1542; this JOURNAL, Supp., Vol. 5 (1911), p. 267.

United States agreed that of the total number of sealskins taken annually at the Pribilof Islands, it would deliver 15% gross in number and value each to Canada and to Japan, and would pay at once \$200,000 each to Great Britain and to Japan, and not less than 1,000 skins per year or \$10,000 annually to each; Russia of the take annually at the Komandorski Islands would deliver 15% each to Canada and to Japan; Japan of the take annually at Robben Island would deliver 10% each to the United States, to Canada, and to Russia; and Great Britain, if any seal herd hereafter resorted to any of its islands, of the take annually would deliver 10% each to the United States, to Japan and to Russia; it being optional with each of the first three countries to suspend all killing on its islands, except for the needs of the natives, when the herds fell below 100,000, 18,000 or 6,500 animals, respectively, until the herds exceeded those numbers again.

This convention was put into effect with appropriate legislation¹⁴ and has afforded such protection that the chief herd with hauling grounds on the Pribilof Islands, estimated at 2,000,000 in 1786, 250,000 in 1835, 3,000,000 in 1867, 1,000,000 in 1891, 185,000 in 1906 and 123,600 in 1911, had grown steadily, with an estimated normal increase of 11% per year, from 215,738 in 1912, the first year in which there was no pelagic killing, to an estimated 2,020,774 on August 10, 1939.¹⁵ United States Coast Guard vessels patrolled the Pacific during the 2,000-mile migration of the Pribilof cows and young males to about 35° N., the latitude of Monterey, California, and return, following the continental shelf thirty or forty miles from shore along the coast of Alaska, British Columbia and the United States, where the fish on which they feed are to be found. The Pribilof bulls probably do not move farther off at any time than the waters south of the Aleutian Islands, and some even stay in and about Bristol Bay, about 350 miles across and mostly less than thirty fathoms deep, and in the waters south of the Pribilof Islands. Commercial killing on land was resumed August 25, 1917, and the authorized take of bachelor seals, chiefly three years old, 41" to 45.75" long, at the rookeries in the drives in June and July has also steadily increased,

¹⁴ United States: Act of Aug. 24, 1912, 37 Stat., 499; Great Britain: Seal Fisheries (North Pacific) Act, 2-3 George V, Chap. 10, Aug. 7, 1912; Canada: Act, 3-4 George V, Chap. 48, June 6, 1913; Russia: After the Revolution of Nov. 7, 1917, the convention was possibly in abeyance as to Russia, but following recognition *de jure* by Great Britain Feb. 1, 1924, and by Japan Jan. 20, 1925, the Soviet Government by a Decree of Feb. 2, 1926, made the convention applicable to the Soviet Union. *Sobr. Zak. i Rasp. S.S.S.R.*, 1926, I, p. 312 ff. (Reference by kindness of Dr. Timothy A. Taracouzio).

¹⁵ U. S. Bureau of Fisheries, Dept. of Commerce, now Fish and Wildlife Service, Dept. of the Interior; Administrative reports (Washington). The seal herd hauling on the Russian Komandorski Islands was from 18,000 to 30,000 in 1911, and not over 50,000 in 1918; and that on the Japanese (formerly Russian) Kurile and Robben Islands was estimated at 6,557 in 1911, 9,041 in 1912, 6,455 in 1915, 12,140 in 1918, 28,226 in 1924, and 40,400 in 1928. They migrate south as far as Tsushima Island in Korea Strait at 34° 30' N. lat. and to the waters off Choshi on the Boso Peninsula in the Pacific at 35° 30' N. lat. Japan Manchoukuo Year Book, 1934 (Tokyo), 390.

from 34,890 in 1918 to over 60,000 in 1939, the largest kill on land since 1889. The United States skins are sold at auction by the Government at St. Louis about May 1 and October 1, and in 1940 brought an average of about \$22 per skin.

In January, 1926,¹⁶ Japan proposed to the other three signatory Powers that a conference be called to revise the 1911 Convention, to make the regulations less stringent in order to decrease the number of seals (estimated at 400,000, of which 370,000, Japan said and the United States denied, belonged to the Pribilof herd) coming into Japanese seas and seriously damaging the Japanese fishing industry; but as the United States had not then (nor until November 16, 1933) recognized the Soviet Government in Russia, it declined to join in any conference or to discuss any new agreement with Soviet Union representatives. On October 23, 1940, Japan notified the United States, Great Britain and Russia that she was abrogating, effective one year thereafter, the 1911 Convention, which accordingly terminated October 24, 1941. Japan gave as a reason that the fur-bearing seals in the North Pacific had multiplied to such an extent that Japanese fishing industries had been damaged. It is now believed that the Pribilof Island seals feed chiefly on seal fish, pollock, and other fishes not used commercially in the United States, and largely on squid, prized by the Japanese as food, but that comparatively few salmon are eaten. In any event it has been fairly well established that the Pribilof herd moves exclusively southeast and south, along the eastern shore of the Pacific, and that it is only seals from the Komandorski and Kurile (Chishima) herds which travel south along the western shore of the Pacific and get into regions where they might feed on Japanese fishing grounds.¹⁷

II. FOOD FISHERIES

1. THE UNITED STATES AND CANADA

The disputes between the United States and Canada over the fisheries in the North Pacific since 1878 have been but slightly less acrimonious and hard fought than over those in the North Atlantic, and the questions of protection, control and division of the halibut, herring and salmon resources have produced a mass of diplomatic correspondence, reports, negotiations and legislation. Since 1900, five treaties have cleared the air somewhat. A convention between the United States and Great Britain signed at Washington April 11, 1908,¹⁸ provided for an International Fisheries Commission to fix the times, seasons and methods of fishing, and, by a system of uniform international regulations, to protect and preserve food fishes in, among other waters, the Strait of San Juan de Fuca and those parts of Washington Sound, the Gulf of Georgia and Puget Sound between 48° 10' and 49° 20', N. lat.,

¹⁶ U. S. Foreign Relations, 1926, II, 462-478.

¹⁷ U. S. Bureau of Fisheries, surveys and charted reports.

¹⁸ 35 U. S. Stat., 2000; this JOURNAL, Supp., Vol. 2 (1908), p. 322.

and such other contiguous waters as might be recommended by the Commission and approved by the two Governments, Canada to protect by adequate regulations the food fishes frequenting the Fraser River; to be in force for four years and thereafter until one year from the date when either Government gives the other notice of its desire for a revision.

On the suggestion of the United States, an American-Canadian Fisheries Conference met in Washington January 16, 1918.¹⁹ After holding hearings in both countries and on both coasts, the conference adopted a final report on September 6, 1918, and submitted a draft for a treaty between the United States and Great Britain concerning the sockeye salmon fisheries of the Fraser River System in British Columbia, emptying into the Strait of Georgia and passing the mouth of Puget Sound. This treaty after minor changes was signed at Washington on September 2, 1919, carrying as an appendix International Regulations for the protection and preservation of those salmon fisheries. The convention was transmitted to the United States Senate on September 3, 1919, but, on objection by representatives of fishery interests in the State of Washington, was withdrawn by President Wilson on January 15, 1920, for the purpose of taking up with Great Britain the revision of Article II. A new treaty, identical with the preceding except for provisions in Article II making it impossible to try United States citizens in Canada for violations of the regulations after they had been tried and acquitted in the United States, was signed at Washington on May 25, 1920,²⁰ but the authorities of the State of Washington objected strongly to its ratification by the United States Government on the ground that the matters referred to came within the jurisdiction of the State.²¹ On August 15, 1921, President Harding withdrew the treaty from the Senate.

Despite Canada's frequent and urgent representations, the sockeye salmon fisheries remained internationally uncontrolled and became largely non-existent, like whaling at the present time, until a convention between the United States and Great Britain for Canada was signed at Washington on May 26, 1930,²² providing for an International Pacific Salmon Fisheries Commission of three members from each country with power to limit or prohibit taking sockeye salmon in specified territorial waters and the high seas westward and the Fraser River system, the convention to be in force for sixteen years and thereafter until one year after notice by either party to the other to terminate it. Washington State opposition again developed

¹⁹ U. S. Foreign Relations: 1918, 432-480; 1919, I, 219-239.

²⁰ U. S. Foreign Relations: 1920, I, 387-390; 1921, I, 290-292, 294-295; 1922, I, 669-672.

²¹ Edward W. Allen, "Control of Fisheries Beyond Three Miles," 14 Washington Law Review (1939), 91, 64 American Bar Association Reports (1939), 401; Gordon Ireland, "Marginal Seas Around the States," 2 Louisiana Law Review (1940), 270; selected Papers and Reports, A. B. A. Section of Int. and Comp. Law, 46 (Chicago, 1940).

²² 50 U. S. Stat., 1355; this JOURNAL, Supp., Vol. 32 (1938), p. 65; 18 Oregon Law Review (1939), 88 at 105; 1 Hackworth, Digest of International Law (1940), 801. Cf. *Dow v. Ickes* (1941), 123 F. (2d) 909.

so that action in the United States Senate was delayed for six years, and ratification was finally consented to on June 16, 1936, only with the reservations that the International Commission should have no power to authorize any type of fishing gear contrary to the laws of Washington or of Canada, should make no regulations for eight years, and should set up an advisory committee of five persons from each country with the right to be heard on all proposed orders, regulations or recommendations.

The American-Canadian Fisheries Conference in its report of September 6, 1918, dealt also with the question of privileges to the fishing vessels of either country in the ports of the other, and with the halibut industry which had grown up since its inception off Cape Flattery, Washington, in 1888, under no more modern international regulation than the treaty between Great Britain and the United States of October 20, 1818.²³ Negotiations were begun in 1919,²⁴ but Washington State and others again made objections and it was not until March 2, 1923,²⁵ that a convention was signed at Washington providing for the appointment of an International Fisheries Commission of two members from each country to investigate the life history of the Pacific halibut and make recommendations as to the regulation of the halibut fishery of the North Pacific Ocean, including Bering Sea; all halibut fishing by nationals, inhabitants, and vessels of the United States and Canada, both in territorial waters and in the high seas off the western coasts, including Bering Sea, being prohibited from November 16 to February 15 for three seasons at least. The United States Senate consented to the ratification of this convention on March 4, 1923, subject to the understanding that none of the nationals, inhabitants and vessels of any other part of Great Britain should engage in halibut fishing contrary to any of the provisions of the treaty.²⁶ Senator Wesley L. Jones of Washington, who introduced the reservation resolution, said that the intention was to cover any part of the British Empire; whereupon the Canadian Government expressed itself as greatly embarrassed, the absence of the British Ambassador's signature from the convention already having caused unfriendly debate in London,²⁷ and pointed out the impossibility of Australia, New Zealand or the British Isles ever becoming competitors in the halibut fishing industry, and declared "even the possibility of Japanese competition to be extremely remote." After obtaining the enactment of changes in the Canadian Halibut Fishery Act of June 30, 1923, which it thought

²³ 1 Treaties of the U. S. (1910), 631.

²⁴ U. S. Foreign Relations: 1919, I, 239-268; 1920, I, 390-409; 1921, I, 288-290, 292-294, 295-296; 1922, I, 672-676; 1923, I, 467-470.

²⁵ 43 U. S. Stat., 1841; this JOURNAL, Supp., Vol. 19 (1925), p. 106. United States: Act of June 7, 1924, 43 U. S. Stat., 648; Canada: The Northern Pacific Halibut Fishery Protection Act, 13-14 George V, Chap. 61, June 30, 1923; Sec. 6 amended and Sec. 9 repealed, 14-15 George V, Chap. 4, May 27, 1924; this JOURNAL, Vol. 28 (1934), pp. 701, 715.

²⁶ U. S. Foreign Relations: 1923, I, 471-482; 1924, I, 335-341.

²⁷ Norman MacKenzie, "Canada: The Treaty-Making Power," 18 British Year Book of International Law (1937), 172; 17 J. Soc. Comp. Leg., N. S. (1917), 5.

desirable, the United States Senate on May 31, 1924, consented to the ratification of the convention without reservation.

When it had been in force five and a half years, this convention was supplanted by a new one signed at Ottawa May 9, 1930,²⁸ which provided for the continuance of the International Fisheries Commission; granted it more specific powers; and was to remain in force for five years and thereafter until two years from the date when either party should give notice to the other of a desire to terminate it. After being in force five years and seven months, this convention in turn was supplanted by a slightly broader one signed at Ottawa January 29, 1937,²⁹ which provided for the further continuance of the International Fisheries Commission created by the 1923 Convention, with power to suspend or change the closed season (from November 1 to February 15), divide into areas the convention waters (the territorial waters and the high seas off the western coasts of the United States, including the southern and western coasts of Alaska, and of Canada), limit the catch of halibut, prohibit the departure of vessels to any area, fix the size and character of halibut fishing appliances, make regulations for the licensing and departure of vessels and the collection of statistics, and close such areas as they found to be populated by small, immature halibut. The convention was to remain in force for five years and thereafter until two years from the date when either party should give notice to the other of a desire to terminate it. With the increasing depletion and scarcity of halibut in the North Atlantic, it was reported in 1939 that Norwegian and British fisheries interests, owning large refrigerator mother ships, were casting appraising eyes on the industry in the North Pacific. Official tagging expeditions have disclosed important spawning grounds of the North Pacific halibut at Yakutat Spit and Portlock Bank in the Gulf of Alaska,³⁰ warmed by the Kuro Shiwo (black current, the Japan Stream). The young fish appear to stay fairly close to the waters in which they were hatched, but the mature fish from eight to twelve years of age and upwards (males up to seventy pounds, females up to 300) of the western school, move westward south of the Aleutian Islands as far at least as Sanak Island (162° 30' W. long.) of the Unimak group. Commercial halibut fishing is not carried on from the United States much west of the Shumagin Islands (160° W. long.).

Not long after the opening of Japanese ports to ships of the United States,

²⁸ 47 U. S. Stat., 1872; this JOURNAL, Supp., Vol. 25 (1931), p. 188. United States: Act of May 2, 1932, 47 U. S. Stat., 142; Canada: The Fisheries Act, 22-23 George V, Chap. 42, May 26, 1932. See this JOURNAL, Vol. 28 (1934), p. 715.

²⁹ 50 U. S. Stat., 1351; this JOURNAL, Supp. Vol. 32 (1938), p. 71; Canada Treaty Series, 1937, No. 9. United States: Act of June 28, 1937, 50 U. S. Stat., 325; Canada: Northern Pacific Halibut Fishery (Convention) Act, 1 George VI, Chap. 36, Apr. 10, 1937.

³⁰ Much helpful information and courteous assistance has been received from Mr. William C. Herrington, now of the North Atlantic Investigations, Fish and Wildlife Service, U. S. Dept. of the Interior, with headquarters at the Harvard University Biological Laboratories. Any errors are the present author's.

as provided in the treaty signed by Commodore Matthew C. Perry with the Japanese Commissioners at Kanagawa March 31, 1854,³¹ United States fishing vessels began to operate extensively in Japanese waters, and, as a result of alleged trespassing (a charge which sixty years later was to be curiously reversed), the Japanese Minister for Foreign Affairs notified the United States Minister in Tokyo on July 31, 1875,³² of the adoption of regulations by which all foreign vessels were prohibited from fishing within reach of a cannon shot from the shore of the coasts of any of the Japanese islands. In 1930 Japanese ships of from 6,000 to 12,000 tons, being floating plants for canning spider-crabs (*gani*) and demersal fish, appeared in Bristol Bay waters from three to 125 miles offshore, and came regularly thereafter during the salmon fishing season, from June 25 to July 25. They attracted particular notice first about 1935, when some of the large Japanese companies operating floating canneries³³ applied to their government for licenses to fish for salmon in Bristol Bay. The Japanese Government declined to grant such licenses, but announced in 1936 that it would make a three-year fishing survey of the salmon (*sake*) resources of Bristol Bay. In 1936 and 1937 Japanese survey vessels and fishing fleets appeared in Bristol Bay, and United States fishermen reported that the Japanese vessels were taking salmon in substantial quantities with gill nets and seines. The Bristol Bay packers became alarmed at the threatened encroachment and interception of the runs of the anadromous fish which they were using, and, after some minor clashes in 1937 between United States Bureau of Fisheries vessels and Japanese fishermen from twenty to thirty miles off the Alaskan shore, the United States Department of State intervened. In perhaps the first application not concerning the Far East of the Pacific consultative policy set forth in the Root-Takahira notes of November 30, 1908,³⁴ negotiations were opened with Japan. The United States Government in the course of a long statement to the Japanese Government, November 22, 1937, said:

The American Government must view with distinct concern the depletion of the salmon resources of Alaska. These resources have been developed and preserved primarily by steps taken by the American Government in coöperation with private interests to promote propagation and permanency of supply. But for these efforts, carried out over a period of years, and but for consistent adherence to a policy of conservation, the Alaska salmon fisheries unquestionably would not have reached anything like their present state of development. . . .

Large bodies of American citizens are of the opinion that the salmon runs of Bristol Bay and elsewhere in Alaskan waters are an American resource; that the salmon fisheries relate to and are linked with the American continent, particularly the northwest area; and that for all

³¹ Treaties and Conventions (1889), 597.

³² U. S. Foreign Relations, 1875, II, 819, 829.

³³ 2 Pacific Affairs (1929), 699.

³⁴ U. S. Foreign Relations, 1908, 510; this JOURNAL, Vol. 9 (1915), p. 813.

practical purposes, the salmon industry is in fact a part of the economic life of the Pacific northwest coast. The fact that salmon taken from waters off the Alaskan coast are spawned and hatched in American inland waters, and when intercepted are returning to American waters, adds further to the conviction that there is in these resources a special and unmistakable American interest. . . .

The American Government is confident that the Japanese Government will realize the seriousness of the problem involved in this situation and the urgency of there being taken early and effective action to dispose of it. The American Government also believes that any solution or arrangement arrived at for the protection of Alaska salmon resources should cover not only the Bristol Bay area but also include and afford protection to all principal American salmon-fishing waters adjacent to the territory of Alaska. The emphasis which has been placed in this statement upon the situation in Bristol Bay arises from the fact that the activities of Japanese fishing vessels have been chiefly observed there; it should not be inferred for this reason that a similar situation in other Alaskan waters would be of less concern to American fishing interests.

The United States Department of State announced on March 25, 1938,³⁵ that the Japanese Government had given, without prejudice to the question of rights under international law, assurances that (1) the Japanese Government was suspending the three-year salmon-fishing survey which had been in progress since 1936 in the waters in question, and (2) it would continue to suspend the issuance of licenses to Japanese vessels which desired to proceed to the Bristol Bay area to fish for salmon, and was prepared to take, if and when conclusive evidence was presented that any Japanese vessels engaged in salmon fishing on a commercial scale in the waters in question, necessary and proper measures to prevent any such further operations. The Department of State added that these assurances of the Japanese Government were regarded as regulating the situation until such time as the problems involved might call for, and circumstances might render practicable, the taking of other measures. These assurances were evidently lived up to, for in 1938 and 1939 the only reported Japanese vessels in Bering Sea were engaged exclusively in crab fishing.³⁶

Further south the United States Commerce Department in March, 1939, reported that the Japanese were using airplanes to locate schools of fish. The training ship *Hakuyo Maru* of the Imperial Fisheries Institute of Tokyo made regular visits to Bering Sea, and in 1937 and 1939 parties of her officers and students were received by United States officials on the Pribilof Islands and escorted on visits to the seal rookeries. At the Hawaiian Islands in December, 1939, United States Naval officers seized two Japanese-owned fishing sampans for sailing inside the forbidden three-mile limit at the entrance to the Pearl Harbor Naval Base. At Honolulu on

³⁵ 18 Press Releases, 412 (Mar. 26, 1938); 48 Current History (May, 1938), 54.

³⁶ Alaska Fishery and Fur Seal Industries in 1938, Bur. of Fisheries, Dept. of the Interior (Washington, 1940), Adm. Rep. No. 36, p. 87; *ibid.*, 1941, No. 40, p. 101.

February 28, 1941, a federal grand jury indicted eighty persons,³⁷ mostly Japanese, for conspiracy to violate the laws governing registration of sampans of over five tons; and on March 1 United States Customs officials seized ten of the small, flat-bottomed craft, and awaited the return of seventy more from the fishing grounds.³⁸ Army and Navy officials voiced suspicions of the operators of some of the sampans which fished offshore in areas where ship manoeuvres were held. Many sworn owners, including United States citizens, appeared to be laborers, clerks and businessmen with no real connection with the fishing industry, of which the expenses and profits seemed from income tax returns in many cases to be for the account of Japanese nationals; and false bills of sale of the sampans were alleged to have been given to relatives by the real owners. The Japanese have taken an ever increasing part in the fishing industry in the Philippine Islands, notwithstanding constantly more stringent laws and regulations to control or exclude them.³⁹

Around the great oceans, at varying distances from the coasts, the bottom of the sea is in most places marked by an abrupt step from a depth of 100 fathoms (600 feet), the greatest depth to which the water is stirred by wave action, to a depth of 10,000 fathoms and more; and the region shoreward from the edge of this step has been called the continental shelf. From conditions favorable for their existence, as to temperature, light, plankton and shelter, most edible fishes, whether migratory or sedentary, are to be found in the shallower water of the shelf or around islands or submerged banks rising in the midst of deeper waters. Where the shelf is narrow the fish will obviously be crowded into a smaller strip, and the fishing will be better than where the shelf widens out and gives more room for the fish to scatter, but the narrower area from more intensive exploitation would also be likely to be fished out sooner. The width of the shelf naturally varies greatly, and is subject to indentations and deep gullies, especially in the neighborhood of islands, but, in general, the 100-fathom contour line may be described as between ten and 100 miles from the eastern coasts of the Pacific and between 100 and 200 miles from the western coasts. Several members of Congress have since 1936 proposed bills to extend by legislation the territorial jurisdiction of the United States into the Pacific to the edge

³⁷ New York Times, Mar. 2, 1941, 32: 1.

³⁸ On Dec. 17, 1941, 1,035 Japanese fishing boats had been tied up in British Columbia under Canadian Federal Defense Regulations since Dec. 7, 1941. As early as 1914, Canada licensed over 200 Japanese salmon fishing vessels for the Skeena and Fraser River regions, where the Japanese began fishing in 1888.

³⁹ Fisheries Act No. 4003, Dec. 5, 1932, 28 Pub. Laws Phil. Ids., 121; Commonwealth Act No. 108, Oct. 30, 1936, 2 Mess. (Phil.) Pres., II, 802; Comm. Act No. 115, Nov. 3, 1936, 2 Mess. (Phil.) Pres., II, 820; Comm. Act No. 421, May 31, 1939, 5 Mess. (Phil.) Pres., II, 13; Comm. Act No. 471, June 16, 1939, 5 Mess. (Phil.) Pres., II, 888. Cf. *People v. Santos* (1936), 63 Phil. 300, 63 J. F. 323 (Fishing within 3 kilometers of Corregidor); 14 Pacific Affairs (1941), 293.

of the continental shelf. Various bills with that purpose have been introduced by Senator Charles L. McNary of Oregon,⁴⁰ Senators Homer T. Bone⁴¹ and Mon C. Wallgren⁴² of Washington, Senator Royal S. Copeland of New York,⁴³ and Delegate Anthony J. Dimond of Alaska,⁴⁴ but none was ever reported out of Committee except Senator Copeland's, which was passed by the Senate without debate, but died in the House Committee.

2. MEXICO

Baja (Lower) California, lacking water, is largely a cactus desert, and all schemes for colonization by free white men have failed, including some promoted in the United States, 1864-1872. Later, Flores, Hale & Company secured from the Mexican Government a concession of about 4,000,000 acres, in a strip of land along the west coast over 400 miles long, from 29° to 23° 30' N. latitude, and about fifteen miles wide, including Sebastian Vizcaino, Tortuga, Ballenas, Pequeña and Magdalena Bays. They built warehouses and established a successful business gathering the orchilla lichen and shipping it to Europe for use in making dyes. Chemical discoveries destroyed the industry, and the property passed into the hands of a New Hampshire lumberman and other creditors. In the spring of 1912, on the invitation of a New York company, a Japanese examined Magdalena Bay with a view to a possible Japanese fishing headquarters and settlement. The United States Department of State reported on April 27, 1912, in very suave language that public opinion would evidently be adverse to the scheme, on the theory that Japan would through it soon have a naval and coaling station on the Mexican coast, and the United States Senate passed on August 2, 1912, a resolution which declared that

When any harbor or other place in the American continent is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government, not

⁴⁰ July 3, 1941, 77th Cong., 1st Sess., S. 1712.

⁴¹ June 18, 1937, 75th Cong., 1st Sess., S. 2679; remarks, 83 Cong. Rec., III, 2618-2622; Feb. 1, 1939, 76th Cong., 1st Sess., S. 1120.

⁴² Sept. 17, 1941, 77th Cong., 1st Sess., S. 1915.

⁴³ Mar. 29, 1938, 75th Cong., 3rd Sess., S. 3744. Remarks, 83 Cong. Rec., III, 2906-2926, 3158-3171. May 5, 1938, passed Senate; to House Comm. on Foreign Affairs; 83 Cong. Rec., IV, 4260, VI, 6297, 6423. This JOURNAL, Vol. 33 (1939), p. 129. Cf. Current note, Edward W. Allen, this JOURNAL, Vol. 36 (1942), p. 115.

⁴⁴ June 17, 1937, 75th Cong., 1st Sess., H. R. 7552, 81 Cong. Rec., V, 5948; Nov. 15, 1937, 75th Cong., 2nd Sess., H. R. 8344, 82 Cong. Rec., I, 20; Feb. 1-2, 1938, Hearings on H. R. 8344, 75th Cong., 3rd Sess., Merch. Marine & Fisheries, No. 154; Jan. 3, 1939, 76th Cong., 1st Sess., H. R. 883, 84 Cong. Rec., I, 32; Feb. 2, 1939, 76th Cong., 1st Sess., H. R. 3661, 84 Cong. Rec., I, 1095. All four were successively referred to the House Comm. on Merchant Marine and Fisheries and died there.

American, as to give that Government practical power of control for naval or military purposes.⁴⁵

The waters off the west coast of Mexico have continued to be of interest to the United States, and in a convention between Mexico and the United States, primarily for the prevention of smuggling, signed at Washington, December 23, 1925,⁴⁶ was included a section on fisheries which provided for an International Fisheries Commission of two members from each country to study and recommend regulations for the conservation and development of marine life resources in the territorial and extraterritorial waters off the Pacific coasts of California and Lower California. Appointment of the commission was announced on April 27, 1926, but nothing is known to have been accomplished before the United States Department of State said on March 22, 1927, that it had given notice to Mexico of the termination of the convention, and it came to an end on March 28, 1927, after a life of one year.

The Japanese fishing fleet has had for a considerable time concessions on the west coast of Mexico for experimental activities as well as for fishing; and two officials of the Imperial Fisheries Institute of Tokyo acted for a time as commissioners of the Mexican Department of Fishing and Hunting. On February 20, 1938,⁴⁷ it was reported that experts representing Japanese interests seeking iron properties in western Mexico had been studying with Mexican Government agencies the possibility of repairing and modernizing the port of Mazatlan in Sinaloa, opposite the tip of Lower California. On November 16, 1938, the Japanese fishing concessions on the west coast were extended for two months. The Mexican Department of National Economy approved a renewal for one year, but the United States diplomatically urged that there be no renewal for the stated reason that the fishing was ruining the Mexican shrimp grounds. The number of Japanese fishing craft working out of the port of Guaymas in Sonora on the Gulf of California had recently doubled, and some of the fishermen were reported to be Japanese naval officers on detached duty. Masters of vessels⁴⁸ from which divers had been sent down off Sonora and Sinaloa told Mexican authorities that they were getting seaweed for chemical purposes. The Maritime Workers Union of Mexico complained to President Lázaro Cárdenas on December 19, 1938, that Japanese ships off the northern part of the coast of Lower California were engaged in spying activities, and had refused to employ Mexicans in their crews, in violation of the Mexican Labor Law. In October, 1939, it

⁴⁵ S. Res. No. 371, 48 Cong. Rec., X, 10045; this JOURNAL, Vol. 6 (1912), p. 937; 9 (1915), *ib.*, 815; 11 (1917), *ib.*, 876, 887; 12 (1918), *ib.*, 536; S. Doc. No. 640, 62nd Cong., 2nd Sess.; K. K. Kawakami, *Japan and World Peace* (1919), 102; 20 *Revue Gén. de Droit Int. Publique* (Paris, 1913), 594.

⁴⁶ 44 U. S. Stat., 2358; 35 *Diario Oficial* (Mexico, April 10, 1926), 761.

⁴⁷ From here to the end of this section, except as otherwise noted, the facts have been gathered from the daily press, chiefly the New York Times, of a day or two after the dates respectively mentioned.

⁴⁸ Of the Nippon Suisan Kaisha and other companies.

was announced in Mexico City that the fishing fleet anchored off Guaymas waiting for the opening of the shrimp season would be ordered back to Japan if President Cárdenas signed a rumored decree prohibiting foreign vessels from working out of Mexican ports. By decrees of November 7, 1939,⁴⁹ zones for shrimp fishing were reserved for coöperative associations of Mexican fishermen only, off the coasts of Sinaloa, Nayarit, Jalisco and Colima. On November 16, 1939,⁵⁰ it was provided that abulón packing plants on land might have floating auxiliaries if of Mexican nationality. As a result of the representations of the United States syndicate that was financing the Mexican fishing coöperatives, and reports that the Japanese were making hydrographic surveys, President Cárdenas was said on September 21, 1940, to have signed a decree reserving all west coast fishing concessions for Mexican coöperatives; and decrees of October 25, 1940,⁵¹ reserved all species of clams and sharks in the maritime waters of the Republic for Mexican regional coöperative associations. On December 8, 1941, Mexico severed diplomatic relations with Japan. On December 12 two Japanese boats were seized and their crews detained on charges of illegal fishing off Lower California, and on December 29, 1941, all permits were cancelled for Japanese fishing in Lower California waters, where about fifty vessels had been operating since a curtailment several months before. After the sinking of two of her merchant vessels, presumably by Axis submarines, Mexico on June 1, 1942, declared war on Germany, Italy and Japan. Mexico has a stretch of about 2,250 miles on the Pacific from the California line at 32° 32' N. lat. to Guatemala at the River Suchiate at about 14° 31' N. lat.

3. CENTRAL AMERICA

Guatemala, which declared war on Japan December 8, 1941, has no good ports on its Pacific shore of about 160 miles from the Mexican boundary to the River Paz and the Salvador line at 13° 44' 11" N. lat. El Salvador in March, 1938, on the instigation of the newspaper *Diario Nuevo*, investigated the movements in Jiquilisco Bay of three Japanese fishing boats said to be taking photographs close inshore. The crews were arrested but released a few days later and allowed to leave aboard their boats. On January 19, 1939, the harbor of La Libertad, nearest port on the shore to the capital, San Salvador, was inspected by the Japanese *Chargé d'Affaires* and S. Minoda from Mexico, Director of a Japanese fishing fleet in Central American waters. El Salvador declared war on Japan on December 8, 1941. Acajutla is the principal port on the Salvador shore of about 160 miles from the Guatemalan boundary to Mala Point on the northern side of the entrance to the Gulf of Fonseca at about 13° 10' N. lat. Honduras, which declared war on Japan December 9, 1941, has access to the Pacific only across the Gulf of

⁴⁹ 117 *Diario Oficial*, No. 23, I, 6, 7.

⁵⁰ *Ibid.*, 9.

⁵¹ 123 *Ibid.*, No. 13, 13.

Fonseca, which is considered a closed sea, whose waters are within the territorial jurisdiction of the three riparian states.⁵² Nicaragua, which declared war on Japan December 8, 1941, has the small ports of Corinto and San Juan del Sur on its Pacific shore of about 195 miles from Coseguina Point on the southern side of the entrance to the Gulf of Fonseca at about 12° 50' N. lat. to Costa Rica on the shore of Salinas Bay at about 11° 10' N. lat. In January, 1938, it was reported that Japanese fishermen barred from Panamanian waters were planning to establish a fishing base at Puntarenas in the Gulf of Nicoya and that a petition for a concession had been presented to the Costa Rican authorities. On May 29, 1938, Yoshitaro Amano, owner of a tuna fishing vessel, formed the Amano Fishing Company in San José and asked Costa Rica for national registration for his ship, which had formerly been based on Panama. Costa Rica declared war on Japan on December 8, 1941. On December 12 United States bombers turned back the Japanese fishing vessel *Alert* into the harbor of Caldera in the Gulf of Nicoya where she had been in refuge, and on being searched by the Costa Rican authorities she was found to have on board 10,000 gallons of Diesel oil, which was confiscated and her crew of seven Japanese and three Americans detained. Costa Rica has several shallow harbors in the Gulfs of Nicoya and Dulce on the Pacific shore of about 320 miles from the Nicaraguan line to Panama at Point Burica at about 8° 2' N. lat. Following charges that the Japanese fishing fleet had been carrying naval officers, and by native fishermen that the Japanese were destroying fish by the use of dynamite, Panama from February 1, 1938,⁵³ reserved all fishing in jurisdictional waters of the Republic for Panamanian nationals. Panama, which declared war on Japan December 8, 1941, has a stretch of about 350 miles on the Pacific, from the Costa Rican line to Colombia at a point midway between Cocalito and La Arditá at about 7° 15' N. lat. Mexico and Guatemala have maintained that territorial waters extend to three leagues or nine miles from their sea coasts, but Salvador, Honduras, Nicaragua, Costa Rica and Panama seem to have adopted the three-mile limit.⁵⁴

4. RUSSIA

In 1866 when Russia and Japan were occupying Sakhalin (Krafto) Island jointly, the frontier gave trouble, and in proposed Russian regulations of March 18, 1867,⁵⁵ to promote a friendly understanding between the two countries, it was provided that all the fisheries then belonging to the Japanese on the island should in the future remain in their enjoyment. In the treaty signed at St. Petersburg, May 7, 1875,⁵⁶ by which Japan ceded to

⁵² Gordon Ireland, *Boundaries, Possessions and Conflicts in Central and North America and the Caribbean* (1941), 129, 207.

⁵³ Decree No. 6 of Jan. 10, 1938; 35 *Gaceta Oficial*, No. 7703, 2.

⁵⁴ Ireland, *op. cit.* (Central America), 411-415. ⁵⁵ U. S. Foreign Relations, 1867, II, 61.

⁵⁶ 66 British and Foreign State Papers, 218; 2 *Martens, Nouv. Rec. Gén. de Traité, 3^e Sér.*, 582.

Russia all of Sakhalin Island which Japan then possessed and Russia in exchange ceded to Japan the eighteen of the Kurile Islands which Russia then possessed, Alexander II, in consideration of the advantages resulting from the cession of Sakhalin Island, (Art. VI) granted (Par. 2) to Japanese vessels and merchants, for navigation and commerce in the ports of the Okhotsk Sea and those of Kamchatka, as well as for fishing in such waters and along the coasts thereof, the rights and privileges which were enjoyed in the Russian Empire by the vessels and merchants of the most favored nations.

By the Treaty of Portsmouth, signed September 5, 1905,⁵⁷ ending the war of 1904-1905, Russia ceded to Japan in perpetuity and in full sovereignty all of Sakhalin Island south of 50° N. lat., and all islands adjacent thereto and all public works and properties thereon, and engaged to arrange with Japan for granting to Japanese subjects rights of fishery along the coasts of the Russian possessions in the Japan, Okhotsk and Bering Seas. The two countries signed at St. Petersburg on July 28, 1907⁵⁸ a Fisheries Convention to last twelve years which gave Japanese subjects the right to fish for all kinds of fish and aquatic products, except fur seals and sea otters (*morski brobov*), along the Russian coasts of the Japan, Okhotsk and Bering Seas, except in the territorial waters of rivers, thirty specified inlets and four bays, and to purchase at public auction and use on an equality with Russians, leases for one, three or five years of fishery lots on the shores and extending into the sea. The Russian fishing (and mining) concessions are around the Okhotsk Sea on the shores of Primorskaya (Maritime Province),⁵⁹ including Kamchatka Peninsula, Amur and the northern half of Sakhalin Island. Russia by a law of May 29, 1911, excluded foreigners generally from all fishing within twelve marine miles of her shore. The Soviet Union put the twelve-mile fishery zone in effect June 1, 1921, and at once elicited a protest from Great Britain.

Following the Revolution of November 7, 1917, and the subsequent collapse of the White Russian Government, Japan suspended payment on the fishery dues on April 4, 1922, until provisional arrangements with the Soviets were made in 1924. Treaty relations with the new Russian Government were regulated in a convention of friendship and economic coöperation signed at Peking, January 20, 1925,⁶⁰ which provided:

⁵⁷ 98 British and Foreign State Papers, 735; 33 Martens, *Nouv. Rec. Gén. de Traités*, 2^e Sér., 3.

⁵⁸ 101 British and Foreign State Papers, 453; 1 Martens, *Nouv. Rec. Gén. de Traités*, 3^e Sér., 861.

⁵⁹ By a boundary treaty signed at Aigun May 16, 1858, China and Russia agreed to possess in common, as theretofore, the territory between the rivers Amur and Usuri and the sea; but by an additional treaty signed at Peking, Nov. 2, 1860, Russia obtained as sole owner the area east of those rivers, containing the Sikhota Alin Mountains on the Gulf of Tartary and the Japan Sea, Usuri Bay and the Golden Horn (Zolotoi Rog), around which Vladivostok (Possessor of the East; founded 1861) was later built. 53 British and Foreign State Papers, 964, 970; 17 Martens, *Nouv. Rec. Gén. de Traités*, I, 1; II, 181.

⁶⁰ 122 British and Foreign State Papers, 894; League of Nations, 34 Treaty Series, 32; 15 Martens, *Nouv. Rec. Gén. de Traités*, 3^e Sér., 323. Cf. Edward W. Allen, North Pacific

Art. 2. The Union of Soviet Socialist Republics agrees that the Treaty of Portsmouth of September 5, 1905, shall remain in full force. . . .

Art. 3. The Governments of the high contracting parties agree that, upon the coming into force of the present convention, they shall proceed to the revision of the Fishery Convention of 1907, taking into consideration such changes as may have taken place in the general conditions since the conclusion of the said Fishery Convention. Pending the conclusion of a convention so revised the Government of the Union of Soviet Socialist Republics shall maintain the practice established in 1924 relating to the lease of fishery lots to Japanese subjects.

The contemplated new Fisheries Convention was signed at Moscow on January 23, 1928,⁶¹ and provided:

Art. 1. The Union of Soviet Socialist Republics grants to Japanese subjects in conformity with the stipulations of the present convention, the right to catch, to take and to prepare all kinds of fish and aquatic products, except fur seals and sea otters, along the coasts of the possessions of the Union of Soviet Socialist Republics in the Japan, Okhotsk and Bering Seas, with the exception of rivers and (thirty-three) inlets. . . .

Art. 2. Japanese subjects are at liberty to engage in catching, taking and preparing fish and aquatic products in the fishery lots, lying both in the sea and on shore, which are specially designated for that purpose. The lease of the said fishery lots shall be granted by public auction without any discrimination being made between Japanese subjects and citizens of the Union of Soviet Socialist Republics. It is understood, however, that, as an exception to the foregoing, those fishery lots for which the Governments of the two high contracting parties have so agreed may be leased without auction. The auction of fishery lots shall take place at Vladivostok in February every year. . . . The catching of whales and codfish as well as of all the fish and aquatic products which cannot be caught or taken in special lots is permitted to Japanese subjects on board sea-going vessels furnished with a special license.

Art. 13. Recognizing that Japanese employees, with their place of habitation in Japan, are engaged there and return thereto after carrying on labor in the seasonal industry of fishery; that their habits and customs are characteristic of Japanese nationality; that free passage between Japan and fishery grounds and free rations during the whole term of engagement are granted; that a share of catches and collections is given them in addition to regular wages, and that medical aid and other means of relief are provided for free of charge: the Union of Soviet Socialist Republics agrees to conform to the above-mentioned facts in the application of its laws and regulations regarding the protection and regulation of labor, which are or may be enacted, to the labor of Japa-

(New York, 1936), Chap. XXV; Edward W. Allen, "North Pacific Fisheries," 10 *Pacific Affairs* (1937), 136.

⁶¹ 129 *British and Foreign State Papers*, II, 769; League of Nations, 80 *Treaty Series*, 342; 25 *Martens, Nouv. Rec. Gén. de Traité, 3^e Sér.*, 425. Cf. M. Mayeda, "The Russo-Japanese Dispute on Fishing Rights," 29 *Journal of International Law and Diplomacy* (Tokyo), Nos. 9 & 10 (Nov. & Dec. 1930); *Survey of International Affairs* (London, 1929), 370.

nese employees in the fishery grounds leased to Japanese subjects in accordance with the provisions of the present convention.

Art. 15. The present convention shall remain in force for eight years and shall be revised or renewed at the end of the said period; thenceforth the convention shall be revised or renewed at the end of every twelve years. Either of the high contracting parties may give notice to the other of its desire to revise the present convention twelve months before the termination of the convention. Negotiations for the revision shall be concluded within the said twelve months. Should neither of the high contracting parties give notice for such revision, the present convention shall remain in force for a further period of twelve years.

Accompanying protocols contained detailed regulations covering matters referred to in the convention.

The Japanese at once set about obtaining greater privileges and more favorable terms, and after negotiations begun in March, 1931, L. M. Karakhan, the Soviet Assistant Commissar for Foreign Affairs, and Koki Hirota, Japanese Ambassador, signed at Moscow on August 13, 1932, a special agreement modifying the 1928 Convention, and providing that of the 392 fishery lots held by Japanese companies the Soviet would allow 330 to be "stabilized" for four years and allotted to the holders for agreed royalties without new competitive bidding.⁶²

The 1928 Fisheries Convention was to expire on May 27, 1936, and in April, 1935,⁶³ the Japanese opened negotiations in Moscow for a new treaty. In March, 1936, it was announced that Premier Koki Hirota was demanding a long term treaty, in effect a prolongation of the 1932 Hirota-Karakhan special agreement abolishing the auction system. On May 12, 1936, the Soviet Government agreed, unwillingly, it said, to extend the existing arrangement to December 31, 1936, in case the new convention should not have been agreed on by May 27, but declared it would grant no further extensions. On July 3, 1936, it became known that Soviet authorities had seized four Japanese schooners with their crews of 42 men, and tried and convicted the captains for fishing off the Kamchatka Peninsula within the three-mile limit; and had presented to the Japanese Government an official demand that they stop poaching by Japanese fishing vessels in Russian waters, together with a protest against the action of a Japanese minelayer which had been placing markers along the three-mile line in the water, conduct which the Soviet Government declared was unprecedented in international relations. On October 2, 1936, it was announced that B. I. Kozlossky, Head of the Second Eastern Department of the Soviet Foreign Service, and Shuichi Sako, Japanese Chargé d'Affaires at Moscow, had agreed on all the main

⁶² Japan Year Books, 1920-1941 (Tokyo).

⁶³ From here to the end of this section, except as otherwise noted, the facts have been compiled from the daily press, chiefly the New York Times, of a day or two after the dates respectively mentioned; and also in part from the Chronicle of International Events in this JOURNAL.

points of a new treaty for the extension for eight years of the fishery agreement, with royalties for stabilized lots, instead of the competitive auction system, which the Japanese considered very favorable, although they failed to gain their demand for twelve-year rights. The text of the treaty was to be initialled in the week of November 9, 1936, and the formal signing to be within two weeks thereafter, when it was rumored in Moscow that Japan was about to enter into some sort of anti-communist agreement with Germany. The Soviet Government thereupon on November 9, 1936, broke off negotiations with Japan, and to all inquiries and urging gave little indication of an intention to resume them. After it became known that Japan had signed an anti-Comintern pact with Germany at Berlin on November 25, 1936, the prospects of ending the delay became obviously more hopeless, and Soviet Foreign Minister Máxim Litvinoff sent a blunt warning to the Japanese Embassy in Moscow that there could be no further coöperation in the matter of granting new fishing concessions until the German-Japanese military pact was cancelled and the situation cleared up. He accused Japan of bad faith in negotiating a hostile treaty with Germany while trying to induce Russia to settle outstanding questions on a friendly basis. Japanese Foreign Minister Hachiro Arita was severely criticized, even in the Privy Council, for letting Russia hear of the German pact until after the vital fisheries treaty was safe. When this five-year pact expired, on November 25, 1941, the three Axis nations renewed it for another five years.

After much pressing for reconsideration by the Japanese Ambassador Mamoru Shigemitsu in Moscow, M. Litvinoff said on December 14, 1936, that the Soviet Union would not deny Japan the fishery rights given her by the 1905 Portsmouth Treaty and confirmed by the 1928 Convention, but would not necessarily be bound by the conditions tentatively agreed on before November 9, 1936. On December 28, 1936, there was signed in Moscow a protocol extending the existing agreement for one year, to December 31, 1937; and such annual extensions for not over one year at a time are all that the Japanese have been able to obtain from the Soviet Union ever since. In September, 1937, the Soviet authorities seized 28 Japanese or Japanese-Korean fishing boats and 277 men on charges of illegal inshore fishing in waters near the Korean-Siberian boundary; and to the protest by Japanese Foreign Minister Koki Hirota that they had the right to fish up to the three-mile limit, the Soviet Government replied that the territorial limit in Siberian waters was eight miles. In November, 1937, Japanese Premier Prince Fumimaro Konoye urged the Soviet Union to renew the fishery treaty with Japan from the "standpoint of justice" and warned that sentiment was growing in Japan for "resolute action." On December 31, 1937, an agreement to extend the existing arrangement for one year, to December 31, 1938, was signed in Tokyo and approved by the Japanese Privy Council.

In 1938 the Soviet Union announced its intention to withdraw forty fishery lots from Japanese operation for strategic reasons, and to re-introduce the

system of auction bidding for a large number of others. Conferences in Moscow in December, 1938, between Soviet Foreign Minister Litvinoff and Japanese Ambassador Shigenori Togo were deadlocked, complicated in part by altered exchange rates between the ruble and the yen, and no new extension agreement had been signed when the existing one expired at the end of the year. On January 25, 1939, Baron Sakatani suggested in the Japanese Parliament that Japan might be willing to sacrifice her fishing rights in exchange for the Russian (northern) half of Sakhalin Island, but later on the same day he "cancelled" the suggestion, as telling the Russians too much. M. Litvinoff and Ambassador Togo signed in Moscow on April 2, 1939, just in time for the opening of the fishing season, an agreement extending the fisheries arrangement to December 31, 1939, withdrawing for strategic reasons instead of the proposed forty only 27 lots, on two of which the Japanese had already built canneries, leaving the Japanese 366 fishing grounds, 264 of them stabilized for five years, at a uniform increase of 10% in royalties, and the Japanese to participate on Soviet terms in a supplementary auction of the remaining lots at Vladivostok on April 4, 1939. This represented a compromise, in which both sides yielded some points, but the Russians in effect won back, by establishing the principle of the withdrawals, the right of sovereignty in their own waters which the Japanese had been contending the Czar partly gave up in the 1905 Treaty of Portsmouth. On October 27, 1939, Japan and the Soviet Union agreed upon the reciprocal release of fishing boats of each taken by the other during the past year and held on charges of poaching or trespassing.

In November, 1939, Foreign Minister Admiral Kichisaburo Nomura began preliminary talks in Tokyo with Soviet Ambassador Constantin Smetanin, a former professor of ichthyology and a fisheries expert, seeking a long-term agreement, in repetition if possible of the 1928 eight-year pact; and on December 15, 1939, Premier and Foreign Commissar Vyacheslaff M. Molotoff told Japanese Ambassador Shigenori Togo in Moscow that the Soviet Government was willing to begin negotiations for a long-term fisheries convention, if Japan would cause to be paid the final installment of the Chinese Eastern Railway price, long overdue from Manchukuo. After lively protests by Japan, it was announced on December 31, 1939, that the Soviet Government had extended the existing fisheries *modus vivendi* for one year, to December 31, 1940, and had agreed to begin immediately negotiations for a long-term treaty. On January 4, 1940, Japan paid the final installment of the Railway price to the Russian Ambassador in Tokyo, as a Manchukuan representative looked on.

In March, 1940, the Soviet Government said that various Japanese fishing boats which had vanished after sailing into a forbidden zone of thirty miles around the submarine base on the Komandorski Islands had been engaged in espionage and "treated accordingly." In 1928 the area had been closed to aliens on the ground of protecting fur-bearing animals, and in 1930 a

closed military zone had been proclaimed around Bering and Medni Islands, which are 1,100 miles from Japan and 950 miles from Dutch Harbor on Unalaska Island in the Aleutian Archipelago. In April, 1940, Soviet patrol boats seized several Japanese fishing boats in Usuri Bay and off Northern Korea, and towed them to Vladivostok. On September 27, 1940, Saburo Kurusu for Japan signed at Berlin a ten-year military pact with Germany and Italy, which was expressly not to affect the political relations of any of the three with Russia. Thereafter, nothing was heard from the Soviet Government about negotiations for a long-term fisheries convention with Japan. On December 20, 1940, Japan protested against a reported machine-gunning by Russian airplanes of Japanese fishing vessels in Soviet waters, causing ten casualties. In January, 1941, Japanese Ambassador Lieut. General Yoshitsugu Tatekawa in Kuibyshev was still negotiating for a permanent agreement, but the Japanese companies were going ahead with their usual preparations for summer operations in Russian Far Eastern waters, to begin in April. On January 21, 1941, Tokyo announced that an extension of the fisheries *modus vivendi* to December 31, 1941, had been agreed upon, with the Japanese lessees paying royalties 20% more than last year; and Foreign Minister Yosuke Matsuoka told the Japanese Diet, probably for United States consumption, that Japan was ready to pay the Soviet Union any price in reason to insure Russia's benevolent neutrality in a Pacific War. On February 3, 1941, it was reported that a commission of ten men was to be appointed by the two countries to work out the details of a permanent fisheries agreement. On February 20 Russia was said to have demanded, in return for a permanent agreement (1) the return to Russia of the southern half of Sakhalin Island (Karafuto), with Japan retaining fishing and other concessions there, (2) the fisheries concessions as outlined in the Treaty of Portsmouth to be halved, and (3) Russia to resume control of the Chinese Eastern Railway. On April 13, 1941, Foreign Commissar Molotoff and Foreign Minister Matsuoka, after a week's negotiations, signed at Moscow a five-year neutrality pact. On March 20, 1942, Andrei J. Vishinsky, Vice-Commissar of Foreign Affairs, and Ambassador Tatekawa signed at Kuibyshev a protocol extending the fisheries agreement to December 31, 1942, with provisions for the Japanese companies not to bid at auction for five of the twelve lots on which the leases ran out December 31, 1941, and to pay 20% more for royalties on all lots on which the leases were continuing. The Kamchatkan fishery lots employ over 20,000 Japanese fishermen during the season, and furnish about one quarter of Japan's annual food supply. Japan catches one quarter of the world's annual take of fish, and in 1934 employed 1,500,000 persons in the fishing industry. Of the Pacific salmon catch, about 70% is taken on the American shore and 30% in Asiatic waters. As to the width of territorial waters, Japan has adopted the British rule of a three-mile limit, and Russia claims in general a belt of four leagues (12 miles).⁶⁴

⁶⁴ Philip C. Jessup, *Law of Territorial Waters* (1927), 26, 45; William E. Masterson,

5. CHINA

The Japanese have long engaged in fishing activities in the Chinese territorial and adjoining waters of the Gulf of Chihli, Yellow Sea, East China Sea, South China Sea and Gulf of Tonkin off the Provinces of Liaotung, Chinchow, Chihli (Hopéi), Shantung, Kiangsu, Chekiang, Fukien and Kwantung; and probably from time to time had agreements with the Chinese Governments, though very little was published to the western world. All continuing executory treaties between the two nations came to an end in consequence of the war of 1894-95 which was ended by the treaty of peace signed at Shimonoseki April 17, 1895.⁶⁵ Neither in that treaty nor in those of commerce and navigation of July 21, 1896,⁶⁶ and October 8, 1903,⁶⁷ was there any mention of fishery concessions or rights, nor does there seem to have been a special fisheries treaty between the two countries. Since the beginning of new hostilities by the invasion of Manchuria in 1931 and the invasion of China proper by Japanese troops in 1937, all existing agreements as to future privileges must be taken to have ended, and Japanese fishermen have presumably operated as they pleased in Chinese waters subject to such limitations only as their own Government's orders or military and naval operations may have imposed upon them. Although not as dependent upon fish for food as are the Japanese, the Chinese of the coastal area consume a large amount; and regulation and control of Asiatic fisheries, including those around Chosen (Korea) and Tai-wan (Formosa), is a matter that will interest the delegates of China also, when they sit down at the conference table. There is little available information from which to deduce China's theory of the width of territorial waters. On December 14, 1899,⁶⁸ the Emperor of China's Minister in Washington signed with Mexico a treaty of friendship, commerce and navigation which provided (Article XI, as to merchant vessels) that

The two contracting parties agree upon considering a distance of three marine leagues, measured from the line of low tide, as the limit of their territorial waters for everything relating to the vigilance and enforcement of the customs house regulations and the necessary measures for the prevention of smuggling.

This, for customs purposes, adopts the Mexican theory. On February 5, 1908, Chinese authorities seized the *Tatsu Maru*, a Japanese merchant vessel, in waters more than three miles off the coast of China, for the prevention of the smuggling of arms; but upon the forceful demand of Japan released the vessel unconditionally and agreed to pay an indemnity.⁶⁹

Jurisdiction in Marginal Seas (1929), 286-303; Christopher B. V. Meyer, Extent of Jurisdiction in Coastal Waters (1937), 235-260, 262.

⁶⁵ 87 British and Foreign State Papers, 799; 21 Martens, *Nouv. Rec. Gén. de Traité, 2^e Sér.*, 642.

⁶⁶ 88 British and Foreign State Papers, 473.

⁶⁷ 96 *Ibid.*, 578.

⁶⁸ 92 *Ibid.*, 1057.

⁶⁹ This JOURNAL, Vol. 2 (1908), p. 391.

III. POST-WAR ADJUSTMENTS

It will probably be possible to settle the conflicting rights and interests of the Pacific nations only by a set of treaty agreements to which they are all parties and under which all must be understood to be empowered, and some at least able and willing, to enforce on behalf of all. The history of the past protective efforts seems to show that to afford any prospect of permanency the arrangement as to ocean fisheries should frankly abandon the conservative historical doctrine of territorial waters fixed for all purposes and admit a progressive realism and sane conservation policy to create new rules in this field. It must of course permit reasonable enjoyment of life to the defeated, and the victors can not hope to realize the fullest extent of their claims. Japan must have fish for food on which to live; Canada and the United States must abandon their neighborly jealousy and squabbles and unite on temporarily self-denying protection and conservation which will offer in the long run the greatest profit for all; and if Russia is sitting in, she and Japan may end their annual struggle for a durable term. Probably there would ultimately be found practicable for all concerned a composition which should forbid altogether pelagic seal hunting and certain kinds of decimating and wasteful fishing, as by dynamite, weirs, seines, gill nets, or floating nets above a specified length; regulate the number and size of floating cannery ships and the mesh of nets; and establish presumptions against all unlicensed fishing boats of any of the parties with gear found within certain distances of Pacific shores, other than those of their own nation, whether the specified lines be determined by surface miles or by undersea contours. For the signatory states there need be no abandonment in principle of their respective traditional claims elsewhere, but the treaties would be considered to unite them in common regulations for the specific subject of Pacific fisheries; just as the United States anti-liquor smuggling treaties of 1924-30 established concessions by the sixteen contracting nations only on the subject of claims for pursuit and capture of their vessels under certain conditions.⁷⁰ To guard against future developments and conflicts requiring further discussion and regulation, it will probably be necessary at the same time to provide that Japanese registered fishing vessels shall not be allowed at all in the Arctic or Atlantic Oceans,⁷¹ and to forbid their passage through Bering Strait and their entrance into the Panama Canal, the Strait of Magellan or the Antarctic Ocean east of a specified boundary. Multipartite international agreements of this general nature, duly ratified and adequately policed, should enable the marine life of the Pacific Ocean to multiply and endure for the support of the human race, when its members shall cease and rest from their desperate endeavors to annihilate each other.

⁷⁰ G. Ireland, "Marginal Seas Around the States," 2 *Louisiana Law Review* (1940), 277.

⁷¹ Incidents with Japanese fishermen have already occurred in the waters of Brasil, Cuba and the east coast of Mexico.

THE U.S.S.R. AND INTERNATIONAL ORGANIZATIONS

BY CHARLES PRINCE

It is of interest to the student of international affairs to examine the relationships of Soviet Russia with international organizations, both public and private, and of the policies governing those relationships. The study aims to find out why the Soviet Government has joined some international unions, affiliated with certain groups, and has refused to coöperate with others. What has been the Soviet Government's policy in entering into multipartite conventions; why has it become a successor to some international agreements that were ratified by the Imperial Russian Government and rejected or abrogated others; and to what extent is the Soviet Union guided by generally accepted principles of international law in its foreign policies as evidenced by its participation in international organizations?

By "international organizations" is understood a "union of two or more states for the service of one or more common needs. To be real and valid the union must be in essence a community of material conditions, productive of common interests and policies. But it must be consciously recognized as such and given legal formulation in order to enter the political and juridical sphere."¹

Our task is difficult in view of the periodic "liquidation" of prominent jurists, and with their removal from seats of authority their works also disappear, thus rendering access to their expositions of Soviet law exceedingly difficult.² Since the dictatorship of the proletariat in the Soviet Union is as yet in a transitional period, one cannot evaluate definitely the principles and policies of international law as practiced by the present Soviet Government. Neither is there a consensus among writers and jurists as to the principles and tenets of international law by which the Soviet leaders are guided in their practice of foreign relations. Thus Mr. Taracouzio contends, quoting Korovine, that the official Soviet doctrine puts the State on an equality with international bodies and collective groups. Furthermore, "the communist government of the Soviet Union considers the organized proletarian masses, scattered throughout the non-communist states, as distinct persons in international law."³ Professor Korovine denies this thesis and argues that such was never the official policy of the government, that it was only his personal opinion which he had since retracted in a published

¹ Pitman B. Potter, *The League of Nations and Other International Organizations*, Geneva Special Studies, Vol. V, No. 6, 1934, p. 5.

² See article by John N. Hazard, "Cleansing Soviet International Law of Anti-Marxist Theories" in this JOURNAL, Vol. 32, 1938, pp. 244-252.

³ T. A. Taracouzio, *The Soviet Union and International Law*, New York, 1935, p. 16.

statement.⁴ Korovine further argues that the Soviet State as a juridical conception, as a sovereign, as a subject of law, is in no way to be distinguished from the conception generally accepted in international law.⁵

These extremely divergent views from two equally recognized authorities should not deter us from adducing our own evidence and from formulating some conclusions concerning the Soviet Union's policies toward international organizations. For obvious reasons our investigation has confined itself to the leading representative collective bodies, in order to warrant some deductions and inferences. Our study thus begins with a discussion of the most prominent of all international organizations—the League of Nations.

THE LEAGUE OF NATIONS

Space does not permit an elaborate elucidation of the various political factors, both foreign and domestic, that brought about a gradually changed outlook and attitude, and a subsequent sympathy from the Kremlin, towards international bodies, particularly the League of Nations. Suffice it to summarize but five obvious events that seemed to have been influential in ultimately bringing the U.S.S.R. to membership in the League of Nations.

1. Soviet Russia had been feeling herself menaced on the east by Japan. This became all the more apparent after the aggressive military party had gained almost complete control of the Japanese Government. At the extraordinary session of the Assembly of the League of Nations, held December 8, 1932, when the Sino-Japanese dispute was discussed, the Japanese representative, M. Matsuoka, made the following statement:

The area over which Sovietism extends is about six times as large as Japan proper. Why has not the movement spread more? The answer is that there stands Japan. At least Soviet Russia respects Japan. Were Japan's position weakened, either by the League of Nations or by any other institution, you may be sure that Sovietism would reach the mouth of the Yangtse in no time.⁶

2. The repeated statements of the Nazi leaders concerning their ambitions enhanced the Soviets' fear of German designs on the Ukraine. Prior to and after his rise to power, Adolph Hitler continually condemned Bolshevism as an attempt of the Jews to obtain world power, and had been insisting that Germany could acquire territory for its surplus population only in the east and must consequently make war on Russia.⁷ In the light of political events during the years 1931–1934, the Soviets came to believe that both Japan and Germany had withdrawn from the League in order that they might have freer hands for the strengthening of their imperialistic power and dominance

⁴ The retraction was published in the form of a letter by Eugene A. Korovine in *Sovetskoe Gosudarstvo* [Soviet Government], 1935, No. 4.

⁵ Harvard Law Review, Vol. 49, 1936, pp. 1392–1395.

⁶ Extraordinary Session of the League Assembly, Vol. III, p. 51.

⁷ Adolph Hitler, *Mein Kampf*, Munich, Franz Eher, 1930. See also Alfred Rosenberg, *Der Mythos des 20. Jahrhunderts*, p. 601 (and quoted in Foreign Policy Reports, Aug. 2, 1933).

by making a joint attack on Soviet Russia—Japan in the east and Germany in the west.

3. The Soviet Union's hesitancy to join the League increased the possibility of war. The Soviets thus began to realize that from the point of view of political expediency it was better for them to be a member of the League and to parade as an exponent of "complete disarmament" and "indivisible peace"; for a war would endanger the Soviet Union's aspirations. Then, too, their prestige among the working classes both at home and abroad would be greatly augmented. And to resist aggression on two fronts simultaneously might prove perilous to the Stalin régime.

4. The Soviets' increased interest in the League was in no small measure due to the setback of communism in China and the break in China-Soviet diplomatic relations in 1927, which tended to divert Soviet energies to the west. Russia's policy of *réalpolitik* prompted her to shift her distrust of the League peace mechanism from cynical abuse to hope and immediate utilitarianism. As a consequence, Russia concluded non-aggression treaties with many members of the League, which in turn brought about a growing friendliness with the League *per se*.

5. The launching of the first and second Five-Year Plans, in 1928 and 1933, made Soviet Russia eager to obtain loans from European capitalists, and she hoped that Geneva might prove a profitable meeting place as well as a platform for dexterous Soviet propaganda.

The diplomatic document which best illustrates the earlier attitude of the Soviet Government toward the League of Nations is the note of the People's Commissariat for Foreign Affairs of the R.S.F.S.R. sent to the League of Nations on March 5, 1923, in answer to an invitation to participate in a naval disarmament conference. Although it accepted the invitation, the Soviet Government stated in this note that it regarded the League as "an institution serving as a disguise for the imperial policies of certain great Powers."⁸ A good case could be made out in justification of the Soviet's hostile attitude toward the League of Nations. France, one of the two chief members of the League, helped Poland, another member of the League, in her war against Soviet Russia. England and the United States aided the White Armies during the Russian Revolution in the hope that such intervention would bring about the downfall of the Communist Government. In addition, President Woodrow Wilson, the chief architect of the League, nourished the same belief as other statesmen at the Paris Peace Conference; namely, that the League might aid the counter-revolutionaries by serving as an antidote to "communist poison." In a memorandum of March 25, 1919, he informed Mr. David Lloyd George, England's Prime Minister:

If we are to offer Europe an alternative to Bolshevism we must make the League of Nations into something which will be both a safe-

⁸ Iu. V. Kliuchnikov i Andrei Sabanin, *Mezhdunarodnaia Politika Noveishogo Vremeni v Dogovorakh, Notakh i Deklaratsiakh* [Recent International Politics in Treaties, Notes, and Declarations], Chasti I-III, Moskva, 1925-1929.

guard to those nations who are prepared for fair dealing with their neighbors and a menace to those who would trespass on the rights of their neighbors, whether they are imperialist empires or imperialist Bolsheviks. An essential element, therefore, in the peace settlement is the constitution of the League of Nations as the effective guardian of international right and international liberty throughout the world.⁹

These events caused the Soviet leaders to become skeptical of the value of the League as an international organization for the maintenance of peace and justice. Hence they looked upon the League chiefly as an anti-Soviet coalition, a cohesion of their enemies, who were actively engaged in attempting to destroy the Soviet Republic. It was this dread and hate of the League which prompted the Russian leaders to express their attitude in no uncertain defamatory terms. Nicolai Lenin characterized the new League as "an alliance of world bandits against the proletariat"; Tchitcherin, then People's Commissar for Foreign Affairs, called it "a league of capitalists against the nations"; and Leon Trotsky, then Commissar of War, described it as "the shadow of the fist of the Supreme Allied Council."¹⁰

But new times bring new songs. The withdrawal of Japan and Germany from the League and their threatened attack on the U.S.S.R. caused the Soviet leaders to modify their attitude and to join the "capitalist" League of Nations. The reasons were outlined by Molotov before his own comrades on January 28, 1935:

It is known that the League of Nations in its time was created by states then still not desirous of recognizing the rights of the new Worker-Peasant State to exist, but instead, participating in anti-Soviet military intervention. Strong efforts were made in its time to transform the League of Nations into a weapon directing the mouth of the cannon on the Soviet Union . . . Since then much water has flowed under the bridge. Events of recent times have emphasized these changes which have taken place in the situation of the League of Nations. The most belligerent, aggressive elements have begun to leave the League of Nations. The League of Nations has become for them, in the given circumstances, confining, inconvenient. But the majority of participants in the League of Nations are now for one or another consideration not interested in the unleashing of war.¹¹

The altered attitude of the Communist Party, too, was of significance in view of the fact that it dominated the government and the Soviet Government was the League's severest and bluntest critic. The changed political exigencies which brought about this shift in diplomatic relations was well

⁹ Harold W. V. Temperley, *A History of the Peace Conference of Paris*, London, Vol. VI, 1924, p. 580 (Published under the auspices of the British Institute of International Affairs).

¹⁰ K. W. Davis, *The Soviet Union and the League of Nations, 1919-1933*, Geneva Special Studies, Vol. V, No. 1, 1934, p. 4.

¹¹ Extract from report submitted by Viacheslav M. Molotov, Chairman of the Council of People's Commissars, on Jan. 28, 1935, to the Seventh All-Union Congress in Moscow. Quoted in *Documents on International Affairs*, 1934, p. 405.

outlined by Joseph Stalin, the Secretary-General of the Communist Party, in his statement that

the League of Nations may become something of a brake to retard the outbreak of military actions or to hinder them. . . . If the League could prove to be somewhat of an obstruction that could, even to a certain extent, hinder the business of war, then it is not impossible that we should support the League of Nations in spite of its colossal defects.¹²

After the Soviet Government was admitted to membership in the League on September 18, 1934, up to its aggression against Finland in December, 1939, it became the leading protagonist of the League of Nations and collective security. This was evidenced by the Soviet's participation in disarmament conferences.

DISARMAMENT AND PEACE CONFERENCES

It is of importance to quote Karl Radek, who was (prior to the purge of 1936) editor of *Izvestia*, Secretary to the Executive Committee of the Communist International, and member of the Central Committee of the Russian Communist Party, for a definitive statement of Soviet Russia's foreign policy:

The object of the Soviet Government is to save the soil of the first proletarian state from the criminal folly of a new war. To this end the Soviet Union has struggled with the greatest determination and consistency for sixteen years. The defence of peace and of the neutrality of the Soviet Union against all attempts to drag it into the whirlwind of a world war is the central problem of Soviet foreign policy.¹³

That the Soviet's drive for disarmament and peace appeared to be a cardinal principle in their scheme of foreign relations is evidenced by their consistent official pronouncements in behalf of an enduring "indivisible peace." This policy was crystallized from the very early days of the Soviet régime. Thus the Decree of Peace adopted at a meeting of the All-Russian Convention of Soviets of Workers, Soldiers and Peasants' Deputies on November 8, 1917, the day following the organization of the Soviet Government, proposed to all warring peoples and their governments to begin immediately negotiations for a just and democratic peace. Peace was thus one of the watchwords of the October Revolution, and this decree further stated:

An overwhelming majority of the exhausted, wearied, and war-tortured workers and laboring classes of all the warring countries are longing for a just and democratic peace—a peace which in the most definite and insistent manner was demanded by Russian workers and peasants after the overthrow of the Czar's monarchy. Such a peace the government considers to be an immediate peace without annexa-

¹² *Izvestia*, Jan. 24, 1934, (*Izvestia* is the official daily organ of the Central Executive Committee of the U.S.S.R. and the All-Russian Executive Committee).

¹³ Foreign Affairs, Vol. XII, No. 2, January 1934, p. 206.

tion (i.e., without seizure of foreign territory, without the forcible annexation of foreign nationalities and without indemnities).¹⁴

Korovine cites official documents of the Soviet Government, numerous declarations made by the men who direct Russia's destiny, and refers to pronouncements in the early 1930's by the leading Soviet statesmen with a view of justifying their advocacy of disarmament and the resultant peace and to dissipate any illusion about a world revolution.¹⁵ Stalin himself voiced the official attitude of the Soviet leaders when he stated: "We do not want a single bit of foreign land. But at the same time, not an inch of our land shall we yield to anyone else."¹⁶ The Soviet leaders, particularly Stalin, repeatedly quote Lenin as the guiding source in shaping their domestic and foreign policies. This is especially true in their campaign for disarmament. It should be noted, however, that Stalin's desire to succeed in "building socialism in one country," and his ruthless efforts to bring about a successful consummation of the second Five-Year Plan, prompted him to embark on this concerted campaign for peace. Hence Soviet leaders refer to Lenin's formulation of Bolshevik policy in the midst of the World War:

Under conditions actually prevailing in the capitalistic world, therefore, the "inter-imperialistic" or "ultra-imperialistic" alliances—irrespective of the form these alliances might take, whether that of one imperialistic coalition against another imperialistic coalition, or that of a general alliance of all the imperialistic Powers—will necessarily be merely "breathing spaces" between wars.¹⁷

This policy manifested itself in a number of non-aggression pacts with neighboring countries, including that with Germany of April 24, 1926. In the light of the principles thus laid down by Lenin, the Soviet Union does not close the door to the possibility of deals, agreements, conventions with imperialistic Powers which are waging a struggle against other imperialistic Powers, provided the latter do not attack nor threaten to make war against the U.S.S.R., and that such treaties will expedite the socialist reconstruction in Russia.

Early in 1926, Khristian Rakovsky, who was the plenipotentiary of the U.S.S.R. successively in Germany, England, and France, pointed out that the Soviet Government often expressed its willingness to coöperate with international organizations and even offered to send observers to the sessions of the League of Nations. "From the international point of view, as well

¹⁴ The Soviet Union and Peace, International Publishers, New York, 1929, p. 22 (A collection of statements and articles by Soviet leaders and official documents relative to war and peace). See also *La Politique internationale du temps nouveau*, de J. Kluitchnikov et A. Sabanine, Vol. II.

¹⁵ Eugene A. Korovine, "The U.S.S.R. and Disarmament" in *International Conciliation*, New York, September 1933, No. 292.

¹⁶ Sixteenth Congress of the Communist Party of the U.S.S.R., Verbatim Report, June 26-July 13, 1930, Moscow, Leningrad, 1930, p. 23.

¹⁷ Nikolai Lenin, *Sobranie Sochinenii* [Collected Works], Vol. XIX, 1927, p. 149.

as from the point of view of domestic policies, we find it in complete conformity with our purposes to participate in such preliminary undertakings which do not conflict with our aims."¹⁸

Even prior to the Soviet Union's adherence to the Covenant of the League of Nations, the Soviet Government participated in the fourth Preparatory Commission for the Disarmament Conference which opened at Geneva on November 30, 1927. The delegates of the U.S.S.R. proposed the total abolition of all land, sea, and air forces; the destruction of all ammunition and armaments; the prohibition of all military training and propaganda, etc. These proposals were rejected by a majority of the delegations, who advanced the thesis that complete disarmament was incompatible with the Covenant of the League of Nations and especially dangerous for the weak states. At the fifth session of the Preparatory Commission at Geneva on March 23, 1928, the Soviet delegation presented a second draft for partial disarmament which was deferred until the next session.¹⁹

It is in the light of this background that the U.S.S.R. declared its adherence to the Pact of Paris on August 31, 1928, and was the first country to ratify it. This Briand-Kellogg Peace Pact provides that the signatory parties renounce war as an instrument of national policy and agree never to seek the solution of disputes arising among them except by pacific means.

Of equal significance was the Soviet Union's attitude toward non-aggression. Maxim Litvinov, People's Commissar for Foreign Affairs, gave a definition of an "aggressor" in a speech which he delivered at the Disarmament Conference on February 6, 1933. Except for a few minor amendments, his definition was adopted by the Security Committee of the Conference on May 18, 1933. In pursuance of this definition of an "aggressor," Litvinov signed collective non-aggression conventions with twelve countries at that conference.²⁰

ARBITRATION

The reasons for the Soviet Government's adverse attitude toward the World Court can not be so easily discerned. The First (in 1899) and Second (in 1907) Peace Conferences were called by the Netherlands Government at the suggestion of the Imperial Russian Government, which ratified the Conventions on Pacific Settlement of International Disputes signed at both conferences. The Permanent Court of International Arbitration established by these conventions was the precursor of the Permanent Court of International Justice created in 1920. The latter (the World Court) does not super-

¹⁸ Kh. G. Rakovsky, *Liga Natsii i U.S.S.R.*, [The League of Nations and the U.S.S.R.], Moskva, 1926, p. 18.

¹⁹ The full text of this revised proposal is published in Documents of the Preparatory Commission for the Disarmament Conference, League of Nations Series, Geneva, 1928, p. 10.

²⁰ U.S.S.R. Handbook, London, 1936, p. 104. See also Frank H. Simonds and Brooks Emeny, *The Great Powers in World Politics*, New York, 1937, p. 322.

sede the former. The Soviet Government apparently does not consider itself bound by the conventions signed at The Hague. In fact, it has not designated any members of the court nor has it paid its share of the expenses.²¹ The Soviet Union was quite specific in stating that in joining the League of Nations it in no way became bound to the Permanent Court of International Justice. On numerous other occasions agreements or conventions were not signed until the representatives of the Soviet Union submitted reservations to the effect that their adherence to a given pact in no way obligated their government to accept the "Optional Clause" concerning recourse to arbitration.

Thus the Soviet Government participated in and later became a party to the International Convention and Protocol for the Suppression of Counterfeit Currency, but it took extraordinary precaution in announcing that its accession to this protocol in no way obligated it to resort to the mechanism of arbitration established by the League. At the moment of signing the convention on July 13, 1931, the representatives of the U.S.S.R. made the following declaration:

The delegation of the U.S.S.R., while accepting the provisions of Article 19, declares that the Government of the U.S.S.R. does not propose to have recourse, in so far as it is concerned, to the jurisdiction of the Permanent Court of International Justice. As regards the provision in the same article by which disputes, which it has not been possible to settle by direct negotiations, would be submitted to any other arbitral procedure than that of the Permanent Court of International Justice, the delegation of the U.S.S.R. expressly declares that acceptance of this provision must not be interpreted as modifying the point of view of the Government of the Union on the general question of arbitration as a means of settling disputes between states.²²

Why the Soviet Government has been so persistent in its refusal to have recourse to the Permanent Court of International Justice is not clear. Their statesmen have not elucidated this point. The statement that seems to approach closest to an explanation is that by Professor Korovine made in 1926 that "the Soviets in their practice admit arbitration, but only in controversies which are either technical in their nature or those which involve private rights."²³ In a letter dated September 15, 1934, addressed to the Assembly of the League of Nations, Maxim Litvinov, then People's Commissar for Foreign Affairs, deemed it expedient to make this reservation:

Since Articles 12 and 13 of the Covenant leave it open to states to submit disputes to arbitration or judicial settlement, the Soviet Government considers it necessary to make it clear that in its opinion, such

²¹ Laurence F. Schmeckebier, *International Organizations in Which the United States Participates*, Washington, 1935, p. 164.

²² League of Nations Treaties Series, CXII, 1931, p. 391.

²³ Eugene A. Korovine, *Sovremenoe Mezhdunarodnoe Publichnoe Pravo* [Contemporary International Public Law], Moskva, 1926, p. 137.

methods should *not* be applicable to conflicts regarding questions arising before its entry into the League.²⁴

Although the Soviets refused to coöperate with the established international agency in the matter of international adjudication, yet they concluded treaties with other countries. It is to be observed, however, that the Soviets have abrogated some treaties and conventions which were contracted by the Czarist Government, and have recognized others when it has proved to be of immediate expediency.

In a proclamation issued on December 7, 1918, and signed by Lenin and Stalin,²⁵ the Council of People's Commissars appealed to the laboring Moslems of Russia and the east to rise against their "oppressors" and to put an end to foreign domination of Asiatic colonies. This document contained also the following significant passage:

Constantinople must remain in the hands of the Mohammedans. . . . We announce that the agreement on the partition of Persia, concluded on August 31, 1907, between Great Britain and the Tzar's empire, is torn up and annulled. . . . We announce that the agreement on the partition of Turkey and the seizure of Armenia is torn up and annulled.²⁶

Again at the Genoa Conference, the Soviet delegation refused to honor the Tzarist debts. Also, one of the primary reasons why the United States refused to grant *de jure* recognition to the U.S.S.R. was that the latter refused to honor the debts of the Tzarist government. The Soviets argued then that after a class revolution, conditions change to such an extent that the new class cannot be expected to pay the very debts contracted to keep the old order in power and to prevent the revolution.²⁷ How is one to reconcile this interpretation of the doctrine of *rebus sic stantibus* with the Soviet's drive for peace, which necessarily rests upon the sanctity of treaties and the observance of international obligations? While this doctrine is susceptible of juridical interpretation, yet the Soviets contend that the formal conditions of the validity of international agreements, based on the prescriptions of logic and the practice of jurisprudence, find their application in the Soviet treaties, as well as in any other conventions between nations. They seem to find no difficulty in justifying their unilateral repudiation of the treaty signed on March 3, 1918, at Brest-Litovsk, and the frequently quoted paragraph three of the decree published by the Soviet Government

²⁴ Verbatim Record of the Fifteenth Annual League Assembly, Sept. 17, 1934. Also quoted in Wheeler-Bennett, Documents on International Affairs, 1934, p. 100.

²⁵ Joseph Stalin was then known as Djugoshvili; his title was "Commissar of Nationalities."

²⁶ For official Russian text see *Mezhdunarodnaia Politika Noveishogo Vremeni v Dogovorakh, Notakh, i Deklaratsiakh* [International Politics in Modern Times], Vol. II, p. 94. Publication of the People's Commissariat of Foreign Affairs, Moscow, 1926. See also Louis Fischer, *The Soviets in World Affairs*, Vol. II, London, 1930, p. 29.

²⁷ For an interpretation of the Soviet's views on international law (up to 1936) see Eugene B. Pashukanis, *Ocherki po Mezhdunarodnomu Pravu* [Outlines of International Law], Moskva, 1935.

on January 28, 1918, which announced that "all foreign loans are hereby annulled without reserve or exception of any kind whatsoever."

Professor Korovine summarizes the Soviets' reasoning by arguing that every international agreement is the expression of an established social order, with a certain balance of collective interests:

So long as their social order endures, such treaties as remain in force, following the principle, *pacta sunt servanda*, must be scrupulously observed. But if in the storm of a social cataclysm one class replaces another at the helm of the state, for the purpose of reorganizing not only economic ties but the governing principles of internal and external politics, the old agreements, in so far as they reflect the preëxisting order of things destroyed by the revolution, become null and void.²⁸

In the memorandum submitted by the Soviet delegation at the Genoa Conference on April 20, 1922, they stated that

the Revolution of 1917 completely destroyed all old economic, social, and political relations, and by substituting a new society for the old one, in virtue of the sovereignty of a revolting people, has transferred the state authority in Russia to a new (different) social class. By so doing it has severed the continuity of all obligations which were essential to the economic life of the social class which has disappeared.²⁹

It is in the light of these claims that the Soviet Government has refused to take over the obligations of former governments, or to satisfy claims of persons who have suffered losses caused by domestic policies. The same train of reasoning is all the more evident in the Soviet's negotiations with international public organizations or unions. Suffice to mention here but a few of the international agreements or conventions to which the Soviet Union has refused to become a party:³⁰ Copyright; International Literary and Artistic Association; International Association for the Protection of Industrial Property; International Federation of Associations of Inventors and Industrial Artists.

It became abundantly clear, however, to close observers and students of international law that the practice of the Soviet Government in its relations with foreign governments and international organizations during the second decade of its existence was the result of a gradual policy which recognized, provisionally or transitionally to be sure, that body of general principles and concrete rules which the members of the family of nations recognize as binding upon themselves in their mutual relations and which are known as international law.³¹ The communistic conception of international law is very

²⁸ Eugene A. Korovine, "Soviet Treaties and International Law," in this JOURNAL, Vol. 22 (1928), p. 763.

²⁹ *Materialii Genuetskoi Konferentsii* [Materials of the Genoa Conference], April 10 to May 19, 1922, Narkomindel, 1922.

³⁰ For a comprehensive list of international bureaus, etc., see Handbook of International Organizations, League of Nation Series, Geneva, 1938.

³¹ For an authoritative statement of the system of international law, see Quincy Wright, *Mandates Under the League of Nations*, Ch. 9, Chicago, 1930.

well expounded by the Soviet theorists Sabanin, Pashukanis,³² Kliuchnikov, and Korovine, to whose writings references are made throughout this article. Of extreme significance, therefore, was the summary outlined by the Soviet Ambassador to the United States. In an address delivered in Washington on April 28, 1934, Mr. Troyanovsky stated that:

International law is a collection of the rules directing the relations among nations. These rules are effective only in so far as the nations themselves accept them, of their own will. . . . I think that only precise international treaties duly signed can give us an acceptable basis for international relations, and consequently for international law.³³

One other factor in preventing the Soviet Union from joining the Permanent Court of International Justice arose from the difficulty in selecting impartial judges. The Soviets have always maintained that, as Litvinov phrased it, there are "two worlds—a Soviet world and a non-Soviet world." Because there was no third world to arbitrate he anticipated difficulties. . . . "Only an angel could be unbiased in judging Russian affairs."³⁴ Assuming that he voiced the attitude of the Soviet Government, his statement casts much light on the relations of the Soviet Union with international organizations, particularly with the World Court. Whether the Soviets will be guided by political exigencies in this case as they have in other cases remains to be seen.

ECONOMIC AND TRADE CONFERENCES

When the U.S.S.R. was faced with serious economic and social emergencies, its earlier hostile attitude was put aside, and active participation in various international conferences resulted. In May, 1927, the Soviet Union participated in the International Economic Conference held at Geneva under the auspices of the League of Nations. The conference recommended a general lowering of tariff barriers, the nationalization of certain industries so as to lower the cost of production, international industrial agreements so as to eliminate undue competition and overproduction, and improved methods and better credit facilities for agriculture. At this conference the Soviet representatives propounded the doctrine of the peaceful co-existence of capitalist and communistic states. The U.S.S.R. was gradually drawn into the technical work of the League of Nations in connection with various international problems for a period of ten years prior to its official affiliations with

³² The reader's attention is called to the fact that until the year 1937, Professor Eugene B. Pashukanis was the recognized exponent of the Communist interpretation of international law. However, he has since been "liquidated" and his textbook, *Ocherki Po Mezhdunarodnomu Pravu* [Outlines for International Law], Moskva, 1935, has been banned.

³³ Alexander A. Troyanovsky, in the Proceedings of the American Society of International Law, 1934, p. 196. See also "Russian Soviet Union and the Law of Nations," editorial by Philip M. Brown in this JOURNAL, Vol. 28 (1934), p. 733; and Frederick L. Schuman, *American Policy Toward Russia Since 1917*, New York, 1928.

³⁴ Conference at The Hague, June 26-July 20, 1922. Minutes and Documents, p. 126.

the League. To illustrate, the Soviet Union was represented at the Opium Conference at London and at the Conference on International Law at The Hague in 1930. The Soviet Government was also represented at the Naval Conference which was convened by the League in 1924 at Rome, and at the Inland Navigation Conference in 1925 at Paris.

Concerning patents, trademarks, and copyrights, the U.S.S.R. has been pursuing a policy, so it seems, of concluding separate agreements with individual states, and of not acceding to multipartite conventions. Although these treaties providing for the protection of industrial property and of literary and artistic property differ from each other in minor details, yet they follow the principles laid down in the Convention on Copyrights signed at Berne in 1886 and as modified by the supplementary conventions of Paris (1886), Berlin (1908), and Rome (1928). These treaties concluded between the U.S.S.R. and individual states concerning the protection of industrial property seem to follow also the principles embodied in the Convention on Protection of Industrial Property concluded at Paris in 1880, and as modified by the supplementary conventions at Paris (1883), Rome (1886), Madrid (1890), Brussels (1897), Washington (1911), and at The Hague in 1925.³⁵

The Soviet's relations with international organizations have been largely motivated, it seems, by its newly adopted policy of establishing closer economic ties with the capitalistic nations. This policy was an outgrowth of a political motive, for it was hoped that markets for and trade with other countries might forestall imperialistic wars. Moreover, the fulfillment of the vast program of industrialization demanded coöperation with the capitalistic world, and since imports of machines and materials were conditioned by the volume of Soviet exports, this also determined the course of Soviet foreign policy.

Hence it is reasonably safe to give credence to the view that the Soviets have pursued such an economic policy as sketched above in order to hasten their program of building socialism in one country and to strengthen the solidarity of its variegated peoples in behalf of Russian nationalism. A casual perusal of current issues of *Pravda*³⁶ and *Izvestia*³⁷ leads one to conclude that even human lives are of insignificance in the process of industrializing Soviet Russia to a degree commensurate with that of the United States. This inference may also be adduced from statements made by the two highest officials of the Soviet Government. Molotov defined the mutual relations of the U.S.S.R. with other countries in terms of "*coöperation and competition*"³⁸; whereas Stalin has been reiterating his thesis that "the period of

³⁵ Taracouzio, *op. cit.*, p. 276.

³⁶ *Pravda* is the official daily organ of the Central Committee and the Moscow Committee of the Communist Party.

³⁷ See footnote 12, *supra*.

³⁸ Excerpt from an address delivered on Jan. 28, 1935, and published in The New York Times, Jan. 29, 1935, p. 7.

the dictatorship of the proletariat and of the building of Socialism in the Soviet Union is the period of the flowering of the national civilizations, which while intrinsically socialist are national in form."³⁹ But the dictatorship of the proletariat seems to be able to shift, over night as it were, from a given policy to one diametrically opposite, whenever political expediency warrants such action.

Thus, in April, 1933, there took place a sensational trial⁴⁰ of six British engineers and 35 Russians. They were accused of espionage, bribery, and sabotage. Shortly after the verdict was announced, the British Government imposed an embargo on a number of articles imported from the Soviet Union, amounting to about 80% of Great Britain's imports from the U.S.S.R. Three days later, the Soviet Government retaliated by an embargo on British goods and by a prohibition on chartering British vessels. On this occasion, Maxim Litvinov issued a statement outlining the principles on which the commercial relations of the Soviet Union with foreign countries are conducted. Among other principles, their policy was asserted to be based on: (1) economic intercourse between countries of the world, and particularly major Powers, irrespective of social and political systems obtaining in them; (2) advantages accruing to each country from trade with other countries based on a real solvency approved by the fulfillment of commercial and financial obligations; (3) absence of political upheavals in relations between trading countries as an inherent condition of stability of trade relations.⁴¹

Even prior to its membership in the League, the Soviet Union coöperated with a number of semi-private organizations of a commercial or technical nature, although such organizations were under the direction of the League, as provided by Article 24 of the Covenant of the League of Nations.⁴² Among such organizations may be listed the International Hydrographic Bureau, the Central International Office for the Control of Liquor Traffic in Africa, the Bureau of Relief to Foreigners, all of which were in existence prior to the founding of the League; and the International Exhibition Office, the International Commission for Navigation, and the Nansen Office for Refugees, which were founded after the League had been established. The Soviet Government has also acceded to the Baltic Geodetic Convention, and the Universal Postal Convention and its relevant instruments;⁴³ the International Convention for the Amelioration of the Condition of the Wounded

³⁹ From the Political Report submitted to the Sixteenth Congress of the Communist Party of the Soviet Union, July, 1930.

⁴⁰ For a brief account of the trial, see Michael T. Florinsky, *World Revolution and the U.S.S.R.*, New York, 1933, pp. 248-251. ⁴¹ *The New York Times*, April 23, 1933.

⁴² Art. 24: "There shall be placed under the direction of the League all international bureaus already established by general treaties if the parties to such treaties consent. All such international bureaus and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League."

⁴³ League of Nations Treaties Series, Vol. XL, pp. 19, 249, 437.

and Sick of Armies in the Field; International Protocol modifying the Convention signed at Paris on May 20, 1875, concerning the Creation of an International Office of Weights and Measures and the Regulations annexed thereto; the Transit Section of the League; Convention on the Anti-Diphtheria Serum; and the Protocol of 1925 Prohibiting the Use of Chemicals and Bacteriological Methods of Warfare.

In adhering to the International Convention for the Suppression of Contraband Traffic in Alcoholic Liquors with Final Protocol and Additional Agreement, the Soviet delegate made it clear, however, that "his Government, in approving the provisions of the present convention, in no way intends to prejudice its position as regards the status in international law of vessels which are the property of the State. . . ." ⁴⁴ From the commencement of its existence in power the Soviet Government has gradually become the successor to the Imperialist Russian Government in acceding to and participating in numerous international economic conferences, conventions and trade agreements.

SANITATION CONVENTIONS

The first international conference to which the Soviet Government was invited by the League was one on health, held at Warsaw March 20-28, 1922. Coöperation in such humanitarian activities, the Soviet delegates insisted, in no way affected their "negative attitude" towards the League as a political entity. Soviet representatives participated in subsequent health conferences held under the auspices of the League; conferences on the unification of vital statistics (1924), on rabies (1927), and on vaccination against tuberculosis (1928) were among those to which the Soviets sent detailed information or delegates or both. It should be pointed out that the Soviet Union *solicited* the coöperation of the Health Organization of the League. At the request of the Soviets in 1924, an expert was sent to Russia to collaborate with a committee of Russian scientists in conducting experiments in vaccination against cholera. Later, in 1925, the Soviet Government asked the League Health Organization to coöperate in investigating the causes of the persistence of endemic plague in certain parts of Eastern Siberia. However, during the few years immediately preceding the Soviets' joining of the League, this contact between the Health Organization of the League and the Health Commissariat in Moscow diminished somewhat. This may be attributed to the fact that the Soviets had less need of the League's Health Section from 1930 to 1933 than formerly; and, in addition, as Davis points out, there was a "replacement in Soviet Russia of the doctors of the older generation, personal friends of many members of the League group, by young members of the Communist Party." ⁴⁵

The U.S.S.R. participated in the International Sanitation Convention in 1926, as well as the International Convention for the Unification of Anti-

⁴⁴ League of Nations Treaties Series, Vol. XLII, p. 87.

⁴⁵ Davis, *op. cit.*, p. 9.

Diphtheria Vaccine in the same year, both of which were sponsored by the Health Section of the League, of which the Soviet Union was not yet a member. However, in signing the protocols of the two conventions, the Soviet delegation made the following reservation:

The Plenipotentiaries of the U.S.S.R., recalling the declaration which they made on May 26, at the sitting of the First Commission, on the subject of Article 7 of the proposed text of the Convention,⁴⁶ declare that they have no objections to make on the subject of the provision relative to the right of the *Office International d'Hygiene Publique* to conclude arrangements with other sanitary organizations; but they are of the opinion that this right results from the Agreement of Rome of December 9, 1907, which determined the functions of the Office. They consider, therefore, that the provision referred to above, which is merely a confirmation of this right, should have appeared in the proces-verbal only, and should not have been made an article of the Convention itself.⁴⁷

At a conference on poison gasses, held at Geneva in 1928, the Soviet delegates were equally careful in making explicit their attitudes and reservations. The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was ratified by the Presidium of the Central Executive Committee of the U.S.S.R. on March 7, 1928. Prior to the formal accession to this protocol, the Soviet delegates made the following reservations:

1. The said Protocol only binds the Government of the U.S.S.R. in relation to the states which have signed and ratified or which have definitely acceded to the Protocol.

2. The said Protocol shall cease to be binding on the Government of the U.S.S.R. in regard to all enemy states whose armed forces or whose allies *de jure* or in fact do not respect the restrictions which are the object of this Protocol.⁴⁸

The Soviet Health Commissariat had also coöperated with the Child Welfare Section of the League Health Organization in submitting pertinent data on child welfare activities as these were carried on in the Soviet Union.⁴⁹

⁴⁶ Art. 7: "In order to facilitate the fulfillment of its duties under this Convention, and having regard to the benefits derived from the information furnished by the epidemiological intelligence service of the League of Nations, including its Eastern Bureau at Singapore and other analogous bureaus, as well as by the Pan American Sanitary Bureau, the *Office International d'Hygiene Publique* is empowered to make necessary arrangements with the Health Committee of the League of Nations as well as with the Pan American Sanitary Bureau and their similar organizations. It remains understood that the relations established under the above-mentioned arrangements will not involve any derogation from the provisions of the Convention of Rome of Dec. 9, 1907, and will not have the result of substituting any other body for the *Office International d'Hygiene Publique*." League of Nations Treaties Series, LXXVIII, 1928, pp. 250-251.

⁴⁷ *Ibid.*, p. 339. See also British and Foreign State Papers, Vol. 123, Part I, p. 662.

⁴⁸ League of Nations Treaties Series, XCIV, p. 71.

⁴⁹ Fifth Session of the Child Welfare Committee of the League of Nations, Social Studies, Vol. IV, March 1, 1929.

There appears to be no convincing evidence as to why the U.S.S.R. has not acceded to international conventions on drugs and narcotics. Neither have they become a party to the Slavery Act of 1885 (Berlin), nor to the Revised Slavery Conventions (Brussels) in 1890 and 1919 (St. Germain), respectively. However, the Soviet Naval Code specifically states that every foreign vessel may be arrested on the high seas if it is violating the provisions of the Brussels and St. Germain conventions relative to slavery.⁵⁰ This provision seems to indicate that the principles embodied in the international slavery conventions are in accord with the Soviet ideas of human liberty.

The Soviets have always contended that the armies of the "capitalistic" countries are composed largely of workers and peasants, proletarian and semi-proletarian masses who are the potential friends of the U.S.S.R. Hence, they regard the activities of those organizations which are engaged in preserving the lives and health of human material as of utmost importance. It is for this reason that they have acceded to the Red Cross Conventions of 1864, of 1906, and of 1929, all of which were signed at Geneva without reservations.

In taking over the Private Russian Society of the Red Cross, the Soviet Government issued a decree on August 7, 1918, which provided among other things that

The Russian Society of the Red Cross is acting on the basis of the Geneva Convention of 1864 and conventions subsequent thereto. It is a member of the International Red Cross Union and communicates with similar organizations in other countries.⁵¹

Similar Red Cross Societies were formed in every separate Soviet Union Republic.

Thus we may conclude that with regard to those activities of the League which were of immediate benefit to the people of the U.S.S.R., and which involved no political commitments, directly or indirectly, the Soviet Government not only participated, but even solicited the coöperation of international bureaus operating directly under the auspices of the League. But at all times the Soviet representatives were explicit in their reservations as to the functions of the international organizations in which the U.S.S.R. participated. More striking evidence of this policy is to be found in the relations of the Soviet Union with the International Labor Office, which is an integral part of the League structure.

INTERNATIONAL LABOR OFFICE

Despite repeated vituperative onslaughts on the League by the leaders of the Soviet Government, the International Labor Office maintained an ac-

⁵⁰ *Ustav Konabel'noy Sluzhby R.K.K.F.* [Statute on the Service of Vessels of the Workers' and Peasants' Red Fleet], May 25, 1925. See also Taracousio, *op. cit.*, p. 279.

⁵¹ *Sbornik Dekretov* [Collection of Orders], 1917-1918, Moskva, 1919, p. 101. See Taracousio, *op. cit.*, p. 328.

tive interest in Soviet Russia, as well as a desire to include her within the scope of its activities. This may be attributed to the sagacity of the first Director of the I.L.O., Mr. Albert Thomas. During the first few years of its existence, the Soviet Government refused to coöperate with the I.L.O., particularly in view of the fact that it was an integral part of the League and was used as an "abominable masquerade to trick the proletariat." In 1920, the Soviet Government also refused admittance to the Investigating Committee of the I.L.O., which was appointed to study labor conditions in Russia. As is commonly known, the Soviet Government gave as its excuse its fears that the committee might supply military information to the Poles, with whom the Soviets were then at war.

Notwithstanding the obvious obstacles, a Russian section of the I.L.O. was established. Its activities proved so unbiased, objective, detached and successful that in 1924 formal relations were established between the I.L.O. and the Labor Commissariat. These contacts advanced and grew firmer, so much to their mutual advantage that in 1927 Markusson, who was then Chief of the Scientific Divisions of the Labor Commissariat, visited the I.L.O. at Geneva and, in turn, in 1929 Mr. Albert Thomas, Director of the I.L.O., visited the Labor Commissariat in Moscow.⁵²

However, this friendly intercourse had its repercussions. In 1930 the I.L.O. published a "Comparative Study of Wages in Various Capital Towns." The section of the study relating to Russia had been approved by the Labor Commissariat prior to its publication. This study showed that wages in Moscow were 30% below those of workers in Berlin. The indignation of Soviet officialdom was aroused, especially since the study had been published with the consent of the Labor Commissariat. The Russian statistician who had collaborated with the I.L.O. was dismissed, and his successor sent a letter to the Director of the I.L.O. stating that the "exchange of publications between the two institutions cannot in any case be interpreted by the Office as a political *rapprochement* between the Soviet Union and the Labor Office."⁵³ Shortly thereafter, friendly relations were re-established between the I.L.O. and the Labor Commissariat. On September 18, 1934, when the Soviet Union was admitted to membership in the League of Nations, the Labor Commissariat also joined the I.L.O.

THIRD INTERNATIONAL

Throughout the relationships of the Soviet Union with foreign governments, with private and semi-private international organizations, tension has obtained because of suspicion of the Soviet Union due to its connection with the Third (Communist) International, whose aim is to further the cause of world revolution. Communist leaders did not disguise their earlier intentions to carry on revolutionary propaganda in other countries. Especially

⁵² Twelfth Annual League Assembly, 1929, Vol. II, p. 13.

⁵³ Fourteenth Annual League Assembly, 1931, Vol. III, p. 13.

was this true during the first few years of the Soviet régime and prior to their embarking on the program of "building socialism in one country." In fact, at the Genoa Economic Conference of 1922, the Soviet delegation refused to enter into any general agreement to abstain from propaganda on the ground that it would be impossible to forbid the activities of political parties and workers' organizations unless they should be contrary to the law of the respective land.⁵⁴

The necessity of aiding a world revolution was a cardinal tenet of the Soviet ideology during the first decade of their régime. As a spokesman of the Communist leaders who seized and held the power of the government, the theoretician Bukharin taught that the Communist Party aims not only toward the liberation of the proletariat of one country, but of the emancipation of the proletariat of the whole world. He then outlined their program by stating that

We must pursue the tactics of universal support of the international revolution, by means of revolutionary propaganda, strikes, revolts in imperialist countries, and by propagating revolts and insurrections in the colonies of these countries.⁵⁵

One cannot state dogmatically, however, that the Soviet Government has violated basic principles of international law. For there seems to be no consensus of opinion among the leading text-writers and jurists on the question as to the scope of state responsibility for preventing and repressing revolutionary acts of private persons against foreign states, even though the latter may be disguised agents of a government. However, some cumulative opinion may serve as a basis, and Professor Lauterpacht has formulated the rule that "international law imposes upon the state the duty of restraining persons resident within its territory from engaging in such revolutionary activities against friendly states as amount to organized acts of force in the form of hostile expeditions against the territory of those states."⁵⁶ It is in the light of this rule, and since they have begun to concentrate on building socialism in one country, that the Soviet Government has been deviating from its earlier path of aiding a world revolution. This shift has contributed greatly towards relieving in a great measure the earlier tension that has prevailed between the U.S.S.R. and other governments. In fact, at the

⁵⁴ *Documents Diplomatiques: Conférence Economique Internationale de Genes*, Paris, 1922, pp. 105-129; Lawrence Preuss, "International Responsibility for Hostile Propaganda Against Foreign States," in this JOURNAL, Vol. 28 (1934), p. 659. Vernon Van Dyke, "State Responsibility for International Propaganda," *ibid.*, Vol. 34 (1940), p. 58 ff. See the scholarly treatise by H. Lauterpacht, "Revolutionary Propaganda by Government," Transactions of the Grotius Society, Vol. 13, and "Problems of Peace and War," paper read before the Society in the year 1927 (London, 1928).

⁵⁵ Nikolai I. Bukharin, *The Communist Program*, p. 73; quoted also in Foreign Policy Information Service, Foreign Policy Association, IV, 1929, No. 25.

⁵⁶ H. Lauterpacht, "Revolutionary Activities of Private Persons Against Foreign States," this JOURNAL, Vol. 22 (1928), p. 126.

Seventh Congress of the Third International held at Moscow in July, 1935, it was decided to relax the rigid control over Communist parties and to urge Communists to coöperate with all other non-communist organizations in a united front against Fascism.⁵⁷

There seems to be no evidence that would suggest that the Soviet leaders have abandoned altogether one of their basic principles, namely, that the *ultimate* aim of Marxism is a world revolution to overthrow the capitalist régime as an industrial, legal, and political system. The facts point, however, to the opposite trend. As an illustration, suffice it to refer to the most emphatic protest made by the United States Government against the flagrant violation of the pledge given in 1935 by the Government of the U.S.S.R. It will be recalled that at the time of exchange of notes between the two governments on November 16, 1933, which led to the *de jure* recognition of the U.S.S.R. by the United States, the Soviet Government committed itself "to refrain, and to restrain all persons in government service and all organizations of the government or under direct or indirect control, including organizations in receipt of any financial assistance from it, from any act overt or covert liable in any way whatsoever to injure the tranquility, prosperity, order or security of the whole or any part of the United States."⁵⁸

Similar incidents have occurred also in other countries. On June 12, 1926, the British Foreign Office sent a memorandum to the People's Commissariat for Foreign Affairs concerning the permission given for the transfer of two million rubles to the British workmen's strike. Three days later, the People's Commissariat for Foreign Affairs replied that the Soviet Government, which expresses the will of the workers and peasants, could not forbid the trade unions of the U.S.S.R. to transfer money abroad to assist the trade unions of another country.

Current literature published in the U.S.S.R. seemed to be devoid of any reference to a world revolution, thus giving the impression that the philosophy of the Third International belonged to the past; yet it is difficult to assume that they have forsworn the idea forever. Rather, it probably still lurks in the background of their minds. The facts concerning the intimate relationship between the Communist Party, the Third International, and the Soviet Government are too well known to need further comment. The extensive system of interlocking directorates between the Central Executive Committee of the Communist Party, of which Joseph Stalin is the Secretary-General, and the Executive Committee of the Third International, is of sufficient evidence to adduce the inference that the *Politbureau* of the Communist Party is the highest organ which directs the destinies of all three organizations. It is not considered necessary in this brief paper to cite any sources as to the definitive purposes of the Third International and to what degree it is financed and dominated by the Communist Party. Attention is

⁵⁷ The New York Times, July 26, 1934, p. 1.

⁵⁸ This JOURNAL, Supp., Vol. 28 (1934), p. 3.

drawn here to this matter only with a view of pointing out that this inter-relationship has been a decided hindrance in establishing friendly relations of the U.S.S.R. with international organizations, and especially with other governments, such as Great Britain and the United States.

The Soviet leaders left no stone unturned before 1939 in their efforts to convince the outer world that their desire for peace was so genuine that they were willing to subordinate some of the basic principles of communism (including those of the Third International) in return for international coöperation and the preservation of an enduring peace. Having failed in this effort, the Soviet-Nazi Non-Aggression Pact of August 23, 1939, ensued. And, true to form, the Nazis' onslaught on Russia on June 22, 1941, caused the Soviet Government to become an important member of the anti-Hitler coalition which resulted in the Declaration by the United Nations, wherein 26 nations pledged to coöperate in "the struggle for victory over Hitlerism" and "not to make a separate armistice or peace with the enemies."⁵⁹

CONCLUSION

Our study may be summarized as follows:

1. The relationship of the Soviet Union to the League of Nations passed from an initial period of bitter, blunt, and cynical criticism to actual membership in the League, due to the threat of German and Japanese attacks, and the imperative need of the domestic economy for freedom from foreign interference. During the five years from 1934 to 1939 the Soviet Government was the leading protagonist of the League of Nations.

2. Prior to its membership in the League of Nations, the Soviet Union coöperated with and even solicited the assistance of various organizations and participated in conferences called by the League dealing with such matters as health, sanitation, and communications which could be directly beneficial to the U.S.S.R.

3. International organizations having a more distinctly political character, such as the International Labor Office, obtained only half-hearted coöperation from the Soviet Union, until the latter joined the League and the I.L.O. Throughout its earlier relations with such bodies, the Soviet Government was careful to make no political commitments.

4. The U.S.S.R. has thus far refused to coöperate with such forms of international adjudication as the Permanent Court for International Justice. Here there were statements of fundamental differences that divided the Soviet Union from the capitalist world, but an outline of the principles of international law which it accepted was manifested in the U.S.S.R.'s foreign relations.

5. The Soviet Union actively participated in various commercial, humanitarian, maritime, and technical organizations, but was always on its guard in

⁵⁹ The New York Times, Jan. 3, 1942.

making reservations to prevent political commitments, and to retain the right of withdrawal.

6. Its relations with other governments passed from a period of undisguised hostility to active negotiation for mutual assistance and non-aggression pacts with one group of "imperialistic Powers" against another group, as an outcome of the Soviet's drive for "an indivisible and enduring peace."

7. The Soviet Government participated in the International Conferences at Genoa and at The Hague in 1922, and at the Disarmament Conference in 1927 at Geneva, where the Soviet delegates expounded the thesis of complete disarmament. The U.S.S.R. was the first country to ratify the Pact of Paris and to make it effective immediately.

8. The Soviet Union regards itself as being still in the transitional period. This accounts for many of the inconsistencies in its relations with international organizations. The U.S.S.R. has recognized and practiced many generally accepted principles of international law. In most cases, however, the Soviet Government was primarily guided by political opportunism and economic exigencies in its relations with foreign governments and international collective bodies.

9. This foreign policy of the U.S.S.R. has been an extension of its internal policy and *vice versa*. In the course of time, there has been a dominant shift from its ideology of a world revolution to a gigantic process of building socialism in Russia alone, which in turn, brought about friendlier intercourse with foreign countries.

EDITORIAL COMMENT

THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW

In view of the fact that the American Society of International Law is holding its annual meeting of 1942 while war is in progress, I would request that the Secretary enter in the minutes of the meeting¹ the following statement of certain fundamental principles which seem to me to be the basic conditions of a future world of law and order:

I. The law of force must be repudiated. The right of self-help must be condemned irrespective of the object which it seeks to attain. War must be deprived of every element of legality which it has possessed in the past, and must be regarded as giving rise to no rights in respect either to the victim of the attack or to third states. The right of self-defense on the part of the individual state must be limited to resistance to illegal violence.

II. An act of force or violence directed against any member of the international community constitutes an international crime, and it is to be regarded not only as a crime against the victim of the attack but against the entire community and against each and every member of it. No state may declare itself indifferent to the commission of a crime or assume an attitude of neutrality towards the parties. Each separate state must regard itself as having a vital national interest of its own in the maintenance of international law and order; and the international community as a whole must recognize a collective responsibility for the protection of each of its members.

III. The responsibility of the international community for the protection of its members gives rise to an obligation to take definite and effective measures of resistance to illegal violence. These measures may be military, or economic, or social, according to the nature of the case; but they must be such as will afford adequate protection to the state attacked, and justify it, if it should so decide, in not attempting to defend itself by force. All states are obligated to take part in these measures of coöperative defense, to the extent of the means at their disposal.

IV. The settlement of disputes between states, of whatever nature or whatever origin they may be, must always be undertaken by pacific means. Should the parties in controversy fail to arrive at a settlement, an individual state or a group of states may offer their good offices and mediation; but if this mediation be unsuccessful, the entire community must assume the responsibility of finding a method of settlement in pursuance of its collective responsibility for the maintenance of law and order.

V. Good faith between nations is the cornerstone of international law.

¹ The statement was dated Rio de Janeiro, April 22, 1942, and was not received in time to be read at the annual meeting of the Society, which took place at Washington, April 25, 1942.—SECRETARY.

Treaties, freely and voluntarily entered into, must be faithfully observed. But at the same time the international community as a whole must create a procedure by which peaceful changes in the contractual relations of states may be made when necessary to prevent injustice resulting from radically new conditions. The collective judgment of the international community, not the will of the individual state, must determine whether the continued existence of certain treaty obligations is causing such injustice as to warrant measures to relieve the state that is bound by them.

VI. The general welfare of the whole community must be regarded as an objective of national policies as well as the protection of more immediate national interests. Justice must be understood to be an essential condition of law and order. Nations are therefore obligated, both individually and collectively, to take into account the conditions that threaten to lead to violence and to seek to find ways and means of removing them.

VII. In view of the obligation of the international community to protect its members against violence and to promote justice in their mutual relations, an organization must be created which will be at all times representative of the community, and which will enable prompt and efficient action to be taken when emergencies arise requiring action.

CHARLES G. FENWICK

DURATION OF TREATIES

That treaties should be kept is an ancient maxim, *pacta sunt servanda*, but it has been often strained in actual operation. Certain tendencies may be easily discoverable, though these do not invariably prevail.

The duration of the effective life of the agreement is usually proportional to the adequacy and clarity of the objective as expressed in the binding article or articles of a treaty. The pronouncement of the Lateran Council in 1139 against the use in war of weapons which cause unnecessary suffering is in principle involved in modern rules, but modern rules would not prohibit the crossbow and the longbow. The Declaration of St. Petersburg of 1868 forbidding the use of explosive bullets weighing less than 400 grams has been reaffirmed in many conventions. The Geneva Convention of 1864 set a standard for the treatment of wounded in war, and these standards have been elaborated and extended in subsequent conventions. Boundary conventions clearly marking the limits of state jurisdiction have been generally respected, but there have been many disputes in regard to indefinite clauses.

Manifestly a treaty of peace among many Powers, particularly when entered upon under an armistice which itself is elaborately equivocal, would aim to cover all or many of the issues of the war which had not been met by superiority of force. The "adventures of the Fourteen Points" in the negotiations of 1919 are illustrative. Linguistic differences may need interpretation, even in such common words as "*société*" and "league" when used in an international document. The use of such words as pact, covenant, etc., has

not always been discriminating. National constitutions may condition the operation of a treaty, as when a financial payment requires a money appropriation by a body not negotiating the treaty. Such doctrines as *expressio unius est exclusio alterius*, *rebus sic stantibus*, further complicate doubtful clauses.

On the other hand, treaties covering many objectives in a single agreement, when these objectives vary in essential nature and may be the result of compromise or trade in remotely related concessions, tend to be unstable. A convention which contains boundary provisions and also regulates conditions of labor may easily give rise to widely unrelated differences, each having merit in itself, but tending to discredit the whole convention or to lead to its denunciation.

In the international discussion of 1936 relating to effectiveness of treaties, the need of "periodic consultative treaty reconsideration" was recognized. At the same time it was evident that the multiplicity of articles, sometimes diverse or obscure, weakened the whole document, as in the 440 articles of the Treaty of Versailles. It was gradually recognized that single treaties with clearly defined single objectives, though adding to the mere number, tended, as in those of the Hague Conferences, to receive increasing respect as the bases of sound and considered international organization and as embodiment of the long cherished principle *pacta sunt servanda*. Writing to Ambassador Choate on September 2, 1901, between the two Hague Conferences, Secretary Hay, referring to the Hay-Pauncefote Treaty, said "he [Lord Lansdowne] is too intelligent not to see that the briefer and simpler the treaty can be made the better."

While the duration of the life period of a so-called permanent treaty, even by a survey of three hundred years, cannot be determined with mathematical accuracy, yet the effective life of such a treaty seems to be in a direct ratio to the brevity, clarity and singleness of objective of the agreement.

GEORGE GRAFTON WILSON

PRIVATE VERSUS PUBLIC INTERNATIONAL LAW

International law has been injured by its friends as well as by its foes. Law, like truth, is a feeble thing unless it is believed in. Scepticism concerning the existence and the value of international law when it is cynically violated is unpardonable. That is the moment for its friends to redouble their efforts in its defense. One reason why some of them are inadequate to this task is because of a poor understanding of the nature of international law and a limited vision of its real function.

It is evident that international law is under a cloud because it has not been sufficiently adaptable to rapidly changing world conditions. Too many publicists on the subject cling to early concepts and formulae better suited to the seventeenth than to the twentieth century. The concept of public international law as applying only between sovereigns may have

served a necessary purpose three hundred years ago, but it is archaic in a day of popular sovereignty. International society has progressed a long way from the time when the rights of kings were paramount to the rights of peoples. The fiction that an individual has no other rights than those conceded and protected by his national government is surely absurd and unjust. And the further inference that a man who happens to be a refugee, proscribed by a tyrant or totalitarian régime, is without any rights as a political person is quite abhorrent.

The doctrine of exclusive territorial sovereignty over aliens which has been maintained by some of the Anglo-American jurists has gravely retarded the development of uniform rules of private international law in Great Britain and the United States. Chauvinistic nationalism has rarely been more obnoxious than in this unwillingness to accept foreign law as *foreign law* in matters affecting the private interests of aliens. It should suffice to enumerate some of these interests to show the incongruity and the injustice of the illiberal attitude of mind revealed in the very title "Conflict of Laws: *De collisione legum*." The very fundamental object of private international law is to obviate any conflicts of laws by providing uniform norms of procedure. Here are some of the subjects demanding uniform rules: Nationality; Domicile; Jurisdiction; Status (Marriage, Legitimacy, Custodianship); Corporations; Property; Contracts; Torts; Administration of Estates; Receiverships, etc., etc. Such matters clearly engage national interests of importance as well as private concern. No territorial sovereign can possibly claim with justice the moral or legal right to ignore the peculiar private interests of any human being, whether he be supported or abandoned by his own national government. These are of the very texture of international relations and make up the daily intercourse of nations in time of peace. They are the constant concern of governments and diplomats. If improperly handled by officials or by courts they inevitably lead to diplomatic controversies, to arbitration, or to a conflict—not of laws, but of arms. They create legal consequences which must be recognized in the courts. There can be no legal vacuum, nor an arbitrary denial of rights by an arrogant territorial sovereign.

The *raison d'être* of private international law is to provide the territorial sovereign with a uniform norm of judicial procedure in matters affecting the rights of aliens. This has been accomplished in large measure by the European system of private international law which has had general acceptance other than by Great Britain and the United States. In the Western Hemisphere most of the nations who are members of the Pan American Union have adopted the Bustamante Code of Private International Law. And the American Law Institute by its Restatement of Conflicts of Laws in 1934 has made a valuable contribution to the great objective of securing greater uniformity of rules of private international law between the three large groups of countries, namely, Continental, Latin-American, and Anglo-

American. In all fairness it must be noted that the United States is greatly handicapped in this objective by reason of the constitutional impediments in the way of uniformity of rules between 48 separate States, and—*pari passu*—uniformity of international rules.

An urgent reason for stressing the extreme importance of private international law at this time is the necessity of planning ahead for the resumption of normal international intercourse at the end of the present war. Public international law, if regarded merely as applying only between sovereign states, will be eclipsed by the dire need of regulating and facilitating the mutual relations of peoples in trade, social intercourse, and other commerce. Special tribunals to facilitate commercial legal procedure may have to be provided. The tangles of human relationships resulting from migrations, exile, and armed occupations, such as marriages, divorces, deaths, wills, taxes, etc., will have to be dealt with intelligently, liberally, and justly, according to generally accepted norms of judicial procedure. They cannot be left to the conflicting ideas and the confusion of diverse local jurisdictions.

Here is a task demanding the highest intelligence and devotion of the friends and defenders of international law, which must be renovated and adapted to the needs of a world in revolution. The peoples of all countries will regain confidence in international law only in so far as it ministers to their actual interests. They can have no patience with theories of sovereignty and legal dialectics. Private international law must no longer be relegated to a separate and an inferior status. There is no clear line of demarcation between it and public international law. Both are integral parts of the law of nations.

PHILIP MARSHALL BROWN

A BRITISH VIEW OF INTERNATIONAL LAW

The Grotius Society of London embarked upon a study of "the sources of international law" soon after the outbreak of World War II. Certain members of the society were stimulated to this action by recent shocks to the "sense of complacency" which had settled on Europe since World War I. This group accepted a statement on December 13, 1939, dealing with the rôle of custom and treaties in international law. An exposition of this document to the society by W. R. Bisschop on December 12, 1940, led to a long discussion in the society and to the appointment of a committee of five to report on the subject.¹

This committee broadened the scope of the inquiry to include the principles underlying "the future of international law," and prepared successive drafts which were debated in July, October and December, 1941.² The final draft, unanimously accepted by the Society on the last of these dates, reads as follows:³

¹ Transactions of the Grotius Society, Vol. XXVI, p. 235; Vol. XXVII, p. 291.

² Transactions, Vol. XXVII, pp. 214-312.

³ *Ibid.*, p. 289-91.

THE FUTURE OF INTERNATIONAL LAW

FINAL DRAFT

1. The present international struggle affects the foundations of political, social and economic life of nations so deeply that it inevitably calls for an examination into the possibility of obtaining such improvement of existing institutions and arrangements as will make the occurrence of a similar disaster unlikely. Among the things thus calling for examination none is more important than the system of international law.

From the present chaos there will emerge an overwhelming need for such a development as will make international law an effective instrument for the guidance and control of States, and will thus provide a clear and uncompromising alternative to international anarchy.

The aspects of international law that call first for consideration in this connexion are those which concern the growth or making of the law and its interpretation, application and enforcement.

The international lawyer is specially qualified to assist in the consideration of such matters.

2. It is often overlooked that the term "law" is used in the expression "international law" in a sense different from that in which it is used in the expression "municipal law."

In the municipal sphere States are in a position to enforce their laws, and these receive authoritative interpretation from Courts of law with unlimited authority to determine all disputes which may arise within their jurisdiction.

In regard to international law, there is at present no authority having the power and means of enforcement. Consequently some States which are aggressively inclined violate its precepts when they think that their interests so demand. This applies even with regard to so fundamental a rule as that regarding the observance of treaties.

Nor is there any organ capable of giving authoritative interpretations to the rules of international law other than the Permanent Court of International Justice, and the jurisdiction of that is restricted.

Without enforceability by appropriate organs, international law will continue to be defied with impunity.

3. The basic type of law in international society at present is custom—as it was in an early phase of national society. Customary law, being slow in growth, difficult to define with precision and subject to gradual desuetude, can never cover more than a small part of the life of a developing community. As it has receded in national societies in favor of deliberate and specific law-making, so it proves inadequate for the needs of modern international society, which demands a more speedy, precise and deliberate regulation of its affairs.

4. Consequently, modern international development shows a great increase of treaties in comparison with customary law. But treaties share with custom the weakness of all present rules of international conduct, namely, the absence of coercive authority. Treaties, custom, general principles of law and equity should therefore be considered essentially as the material to be moulded by international organs into an effective system of international law.

5. The above considerations point to the need for the abandonment of the "diplomatic" approach to international law, which has left an undue measure of freedom to States and brought international law into disrepute, and for the establishment of some system of international order and authority involving the acceptance of considerable limitations of national sovereignty. ✓

In what constitutional form international authority should be established is a question requiring separate consideration. It involves the finding of international equivalents for the factors known to national law as legislation, jurisdiction and execution.

6. The nature of modern international relations makes it necessary that international law should embrace economic and social as well as political matters. To ensure universal peace and order, international law must be universal. Its operation however requires the existence of some minimum level of civilization and moral values among the nations subject

to it. While therefore the aim must be a universal law, the development of a new international law from a nucleus of States must be envisaged as a possibility.

F. N. KEEN, LL.B., *Chairman*

Sir CECIL HURST, G.C.M.G., K.C.B., K.C.

Dr. W. FRIEDMANN, LL.M.

Professor NORMAN BENTWICH, M.C., O.B.E., M.A.

Professor GEORGE W. KEETON.

ERIC M. FLETCHER, LL.D.

Dr. W. R. BISSCHOP.

This text assumes that international law is a human institution susceptible of control by human effort, that one of its major functions is to preserve peace and order in the world, that it has not performed this function satisfactorily, especially in recent years, that this inadequacy could be remedied by developing international law by analogy to advanced systems of municipal law, that such a development involves limitations of national sovereignty, that this requires "international authority" involving "international equivalents for the factors known to national law as legislation, jurisdiction and execution," that international law should be extended to economic and social as well as political matters, and that international law should be universal, though limited groupings of states might provide a nucleus for reform.

Not one of these propositions was uncontested during the spirited debates. Objectors who began with an attack on the principles in most cases eventually acknowledged that their difficulties lay in disproportionate emphasis upon certain aspects, in ambiguous terminology, or in opinions upon the political expediency of such pronouncements in the present circumstances. There were some who feared that criticism of international law might seem to condone recent violations, and might further reduce public respect for the subject.

It is no small tribute to the juristic and diplomatic skill of the Chairman, Sir Cecil Hurst, a judge of the Permanent Court of International Justice, as well as to the patience of the Committee (to which Hurst and Bentwich were added to make the final draft) that a text was finally evolved commanding unanimous consent of those present at the meeting. Though modified in terminology and emphasis, the underlying principles from which the committee started seemed not to have been altered.

It is not the purpose of this comment to analyze the text, but rather to draw it to the attention of American jurists and to express the hope that it may stimulate them to examine the premises of their subject in a similar spirit. It is a pleasure to note that with the assistance of the Carnegie Endowment for International Peace a group under the chairmanship of another judge of the Permanent Court of International Justice, Manley O. Hudson, is already engaged in such a task.

QUINCY WRIGHT

PRIZE RULES

The United States District Court for the Southern District of New York has issued "Prize Rules and Standing Interrogatories in Prize—January 8,

1942."¹ With charming antiquarianism, the Court readopts the rules published in 1875 by Judge Samuel Blatchford. It modifies Rule 51 (on appeals) to conform to later legislation and adds to Judge Blatchford's forty-three interrogatories three more which the Court had adopted in a minute of September 7, 1861. The exigencies of totalitarian war which produced the streamlined British "Prize Court Rules, 1939,"² applicable alike to ships and aircraft, have not produced here the abandonment of terms so pregnant with history as "sea-briefs," "cockets," "letters of marque," "privateer," and "colorable bills of lading." Witnesses must still be interrogated as to whether the ship had on board "flints" and "ball-moulds," "saltpetre" or "nitre."

Judge Blatchford's rules first were printed in 1866 in his *Reports of Cases in Prize—1861–65* at pages 673 ff. These were the same as *Stated Rules and Standing Interrogatories in Prize Causes in the District Court of the Southern District of New York adopted May Term 1861* and printed in pamphlet form in that year. This edition revised only slightly the Prize Rules published by Judge Samuel R. Betts in 1838 and possibly adopted ten years earlier.³ Judge Betts indicates that Prize Rules based on the English rules had been adopted prior to 1828,⁴ but no such earlier version has been found.

There is little doubt that the District Court, together with other American lawyers and judges, turned to Story as their authority. Story's prize notes appeared originally in the appendices to the first (1816) and second (1817) volumes of Wheaton's reports and were credited to Wheaton for a long time.⁵ But Frederic Thomas Pratt's edition of the *Notes on the Principles and Practice of Prize Courts by the Late Judge Story*, published in England in 1854, quoted from Story's biography a memorandum confessing authorship. Story, in turn, relied heavily on the famous letter from Sir William Scott and Sir John Nicholl to John Jay in 1794.⁶ This procedure was then already traditional and the substance of the standing interrogatories can be found in samples as early as 1664.⁷

The Prize Rules now in force in the Southern District of New York still feature the work of the "prize commissioners" upon whom rest, as Francis Upton wrote in 1863, "many onerous, and highly responsible duties."⁸

¹ 42 F. Supp. XXVII; The Maritime Law Association of the United States, Document No. 271, January, 1942.

² Statutory Rules and Orders 1939, No. 1486, L. 23.

³ "A Summary of Practice in Instance Revenue and Prize Causes . . . together with the Rules of the District Court," p. 53 and cf. p. xii.

⁴ *Loc. cit.*

⁵ Even in Moore's Digest (1906), Vol. VII, p. 608.

⁶ Reprinted in Pratt and in Moore's Digest, *op. cit.*, and with attendant detail in Moore, International Adjudications, Modern Series, Vol. 4, p. 43.

⁷ Neutrality, Its History, Economics and Law, Vol. I, Jessup and Deak, "The Origins", p. 220, n. 68.

⁸ The Law of Nations Affecting Commerce During War, 3rd ed., p. 453. The names of the three commissioners appointed for the Eastern District were announced in the New York Times, March 13, 1942.

The English practice, however, has practically eliminated the functions of these officials, just as it has apparently given up the standing interrogatories.

The reason for the difference between the antique flavor of the rules in New York and those in England is not far to seek. The British rules were revised in 1914, twice in 1915, and in 1917; the modifications were forged in the heat of battle. Our courts were practically unconcerned with prize cases in World War I.⁹ In World War II, the British Prize Courts have again been active,¹⁰ but the comparable United States courts have not as yet, so far as is known. The German Government by a quaint coincidence promulgated a new Prize Court Code on August 28, 1939, three days before the outbreak of war.¹¹ It is not known whether this Code has been supplemented by detailed regulations as envisaged in Articles 74 and 75. The French prize procedure is laid down in an annex to an Order of December 24, 1939.¹²

Prize law and proceedings have played a relatively minor political rôle in World War II, due in part to the United States policy of self-denial registered in its neutrality acts. Currently it is very difficult to secure the texts of all prize court decisions and hence to appraise the situation. As part of the history of international law, the record will need to be written when the documents are available.

PHILIP C. JESSUP

FACILITATION OF NATURALIZATION THROUGH MILITARY SERVICE

Recent legislation of the United States permits aliens who serve in the armed forces to acquire American citizenship in a much shorter time and through a simpler procedure than heretofore. The development has drawn attention anew to the legal status of aliens when the country of their sojourn or residence is at war. Policies as to selective service, immigration and naturalization are involved, as are also commitments under treaties and obligations under customary international law. International legal aspects may be usefully distinguished from municipal law aspects. A brief consideration of the law, and of past practice of the United States, will make it possible to view in perspective the present American policy.

The presence in a state's army of individuals not possessing the citizenship of that state may be on a voluntary or an involuntary basis. That a state as a belligerent may legally admit to its armed forces nationals of allied or neutral states who are in its territory is now clear.¹ The right of a state, under international law, to conscript aliens within its jurisdiction has been

⁹ Cf. Garner, *Prize Law During the World War*, p. xliii.

¹⁰ Cf. Kunz, "British Prize Cases, 1939-1941," this JOURNAL, Vol. 36 (1942), p. 204.

¹¹ See United States Department of Commerce, *Comparative Law Series*, Vol. III, No. 1, January, 1940, p. 50.

¹² *Ibid.*, Vol. III, No. 6, June 1940, p. 325.

¹ Oppenheim, *International Law* (6th ed., 1940), II, 207; Hyde, *International Law* (1921), II, 651. Cf., however, E. M. Borchard in this JOURNAL, Vol. 32 (1938), at p. 537.

frequently in question. Vattel's view was that there was no right to force aliens to serve.² In 1804 Mr. Madison, Secretary of State, wrote to Monroe, then Minister to England, that "Citizens or subjects of one country residing in another . . . can never be rightfully forced into military service. . . ."³ The position which the United States took concerning impressment in the years before the War of 1812 is a matter of common knowledge. Difficulties between European Powers and other American states related to forced service by aliens. There was a French blockade of the La Plata in 1838 and an Anglo-French blockade of Buenos Aires in 1846 partly because the Argentine Republic had required service of nationals of these countries domiciled in Argentina.^{3a}

Later in the century came a tendency to distinguish between times of great emergency and less serious occasions for the purpose of setting rules. Secretary Seward wrote in 1868 that, "This Government is not disposed to draw in question the right of a nation *in a case of extreme necessity* to enroll in the military forces all persons within its territories, whether citizens or domiciled foreigners."⁴ In the following year Secretary of State Fish wrote that, "This Government, though waiving the exercise of the right to require military service from all residents, has never surrendered that right, and can not object if other governments insist upon it."⁵ In the period of the American War between the States, Lord Lyons, Minister from Great Britain, had been instructed by his government that "there is no rule or principle of international law which prohibits the government of any country from requiring aliens resident within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishment."⁶

Questions naturally arose as to the effect of an alien's close connection with the country of residence and his active participation in its affairs. Aliens sometimes voted in State elections in the United States. Attorney General Bates gave as his opinion that aliens who had at any time exercised this privilege were liable under the Acts for enrolling the forces.⁷ In 1880 the impressment of mere visitors to Mexico brought from the American Government a protest on the grounds of "public law and national comity."⁸

The opinion that, even without treaty commitments on the point, a state was bound under international law to grant exemption from military service to resident aliens,⁹ was not universally accepted by the time of the Second Hague Peace Conference. While certain governments there represented

² *Droit des gens*, Bk. III, Ch. II, Sec. 14.

³ J. B. Moore, *Digest*, IV, 52.

^{3a} Ricardo Levene, *A History of Argentina* (W. S. Robertson, trans., 1937), Ch. XLIX; J. F. Cady, *Foreign Intervention in the Rio de la Plata, 1838-50* (1929), Chs. II, VII.

⁴ *Ibid.*, p. 57 (Italics inserted.) Cf. Hall (5th ed., 1904) at p. 209, and Bluntschli, *Le droit international codifié*, Sec. 391.

⁵ J. B. Moore, *Digest*, IV, p. 57.

⁶ *Ibid.*, p. 57.

⁷ *Ibid.*, p. 55.

⁸ *For. Rel.*, 1880, p. 776-7.

⁹ As held, for example, by Frantz Despagne, *Cours de droit international public* (1899), Sec. 354.

avored prohibition of conscription of resident aliens, others had legislation under which aliens might be held to service under certain conditions. The conference expressed a *vœu* "That the high (signatory) powers should seek to establish in agreements with each other uniform contractual undertakings determining in respect to military burdens, the relations of each state in respect to the strangers established in its territory."¹⁰ No uniformity was achieved, but numerous bilateral treaties, to a number of which the United States was a party, did specify exemption for nationals of the treaty states.¹¹ The very fact that such exemption was often, but by no means always, expressly provided for in treaties, was regarded by one observer in 1911 as justifying the assumption that there would be liability to service in the absence of specific exemption.¹² It is possible, however, to argue that the treaties are declaratory of pre-existing law.^{13a}

During the World War of 1914-1918, Spanish petitioners invoked provisions of one of these bilateral treaties as a defense in the case of *Ex parte Larrucea* before a Federal District Court.¹³ Notwithstanding this, and the judicial notice of the fact that it has been the "attitude" of the State Department from the time of Madison that "resident aliens not naturalized are not liable to perform military service," the court found that it must apply the Selective Service Act (of May 18, 1917) as over the treaty (of 1903), and it remanded the petitioners to the political departments of government.¹⁴

Requests for exemption have sometimes rested upon something besides strict law. "As a general rule . . . except in cases of dual nationality or similar possibility of claim," Borchard points out, "a demand by the home government of an alien compelled to do military service results in his release from service, on grounds of comity, if not of law."¹⁵ When becoming a party

¹⁰ For. Rel., 1907, Pt. 2, p. 1179. See also G. B. Davis, "The Second, Third and Fourth Vœux of the Conference," this JOURNAL, Vol. 2 (1908), pp. 811-814.

¹¹ In a dispatch of July 19, 1894, Mr. Bayard reported to Mr. Gresham, Secretary of State, the opinion which had been rendered by the law officers of the Crown in England, that while no exemption existed by general rule, treaties had largely established it. For. Rel., 1894, p. 253. See also K. Matsudaira, *Le droit conventionnel international du Japon* (1931), pp. 85-86.

By the provisions of some bilateral treaties, consular officers, and not nationals in general, receive the exemption.

¹² H. T. Kingsbury, in Proc. Amer. Soc. Int. Law, 1911, p. 221. Mr. Kingsbury also made the point that, in contrast to continental Europe, the United States had resorted to compulsory military service only abnormally and occasionally, and that it might therefore be required more justifiably of resident aliens, particularly declarants. He found no foundation in international law for requiring "discrimination" in favor of aliens.

^{13a} Cf. the view of the Acting Secretary of State (Polk) to the Attorney General (Gregory), Aug. 9, 1918. G. H. Hackworth, Digest, III, 599.

¹³ The Spanish-American Treaty of 1903 provided, in Art. 5: "The citizens and subjects of each of the high contracting parties shall be exempt in the territories of the other from all compulsory military service, by land or sea. . . ." 33 Stat. 2108.

¹⁴ 249 Fed. 981 (1917). *Ex parte Blazekovic*, 248 Fed. 327 (1918), is in accord.

¹⁵ Diplomatic Protection of Citizens Abroad (1915), p. 66. See an invocation by Mr.

to the Pan American Convention on the Status of Aliens, signed at Havana in 1928, the United States specifically rejected Article 3, which would have established for the parties a general rule of exemption of aliens from military service.¹⁶

In its actual practice the United States has shown much moderation and forbearance in the matter of military service by aliens. Legislation during the period of the War between the States¹⁷ applied to citizens and to declarant aliens. In the case of the latter it was made possible for the persons to have ample time (65 days) within which to leave the country and thus avoid the service. Concerning service by foreigners in this war, Secretary Bayard wrote in 1888 that "there is not a single instance in which an alien was held to military duty when his Government called for his release."¹⁸ While the draft policy of 1917-1918 was based upon "liability to military service," more than a million persons were given deferred classifications, between July, 1917, and October, 1918, because of their alienage.¹⁹

The Selective Service Act of September 16, 1940, as amended August 18, 1941,²⁰ applied to "every male citizen of the United States and every male alien residing in the United States who has declared his intention to become such a citizen" between specified ages. A ruling of the Attorney General has held that every alien between these ages living or having a place of residence or abode in the United States, temporarily or otherwise, is required to register, unless within the classes specifically exempted.²¹ Any registered

Davis, Assistant Secretary of State, in 1873, of comity and reciprocity as a basis for exemption. J. B. Moore, Digest, IV, p. 58.

¹⁶ 46 Stat. (Pt. 2) 2753, 2756.

¹⁷ Act of March 3, 1863, 12 Stat. 731.

¹⁸ J. B. Moore, Digest, IV, 55. See, on more recent practice, G. H. Hackworth, Digest, III, 600-611.

¹⁹ Second Report of the Provost Marshal General, Dec. 20, 1918, referred to by Green H. Hackworth, in Proc. Amer. Soc. Int. Law, 1925, pp. 59, 68.

²⁰ 54 Stat. 885; 55 *ibid.* 627. After the United States became a belligerent, this part of the law was amended to read as follows: "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to Section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: *Provided further*, That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces." Public Law 360, 77th Cong., approved Dec. 20, 1941.

²¹ 39 Ops. Atty. Gen. 504. Cf. the announcement from National Headquarters of the Selective Service System that "Alien students and others who are in this country in a non-resident status and who have not declared their intention to become citizens are not required to register, provided their non-resident status is duly determined by the local Selective Serv-

alien, declarant or non-declarant, may avoid the service by executing the necessary form,²² and thereby giving up the right ever to acquire the citizenship of the United States. In the case of non-declarant aliens who do enter the service, there is provision for their opting for service in the armed forces of a co-belligerent country with which the United States may have made an agreement for this purpose.²³ The recent agreement accomplished by an exchange of notes with Canada²⁴ is presumably the first of a series to be made on this subject.²⁵ The plan recalls the treaties concerning reciprocal military service made in 1918 with Great Britain, Great Britain in respect of Canada, France, Greece and Italy, respectively, whereby a national of one party in the territory of another might be required to serve in the armies of the latter without its divesting him of his citizenship.²⁶

Prior to 1942, the nationality code of the United States had made possible the facilitation of naturalization through military service, but not on the basis of such a short period of service as Congress has now authorized.²⁷ The Act effective March 27, 1942,²⁸ provides that any person not a citizen,

ice boards. However, selective service regulations require aliens who consider themselves to be in this country in a non-resident status to arrange for a determination of their status by the Selective Service local board in the community where they are temporarily residing." *Selective Service*, Vol. II, No. 4 (April, 1942), p. 3.

²² DSS Form 301 (Application by Alien for Relief from Military Service).

²³ This regulation apparently dates from May 2, 1942.

²⁴ U. S. Department of State Bulletin, Vol. VI, No. 146 (April 11, 1942), pp. 315-318. The American note of March 30, referring to the practice in the war of 1914-1918, said: "It will be recalled that during the World War this Government signed conventions with certain associated powers on this subject. The United States Government believes, however, that under existing circumstances the same ends may now be accomplished through administrative action, thus obviating the delays incident to the signing and ratification of conventions." The note also referred to the desirability of the plan "from the standpoint of morale of the individuals concerned and the over-all military effort of the countries at war with the Axis Powers."

The Canadian note of April 6 included the following statements: "The policy of the Canadian Government and Canadian legislation have been based on the assumption that measures applying compulsory military service to aliens should be founded upon agreement with the interested Governments. The Canadian Government is of the opinion that difficulties might arise if there were general recognition of a right to conscript aliens, implying corresponding rights in other countries to conscript Canadian nationals. The Canadian Government, however, does not wish to raise a legal objection at the present time . . . the Canadian Government is prepared to coöperate with the Government of the United States by participating in the régime set forth above, full reciprocity on all points being assured by the United States Government."

²⁵ *Selective Service*, Vol. II, No. 5 (May, 1942), p. 3.

²⁶ Texts in 40 Stat. (Pt. 2), pp. 1620, 1624, 1629, 1633, 1637. For a somewhat different plan relating to service by nationals of one party in the territory of another, see the Franco-Spanish Consular Convention of Jan. 7, 1861, Art. V. *British and Foreign State Papers*, Vol. 52, pp. 139, 141.

²⁷ The law of 1940, for example, contemplated an aggregate of three years of service by the petitioner. U.S.C.A., Tit. 8, Sec. 724, 54 Stat. 1149.

²⁸ Second War Powers Act, 1942, Public Law 507, 77th Cong., Title X.

regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who is lawfully admitted to the United States (including territories and possessions), and who shall have been at the time of his enlistment or induction a resident thereof, may have his naturalization greatly expedited by reason of his service. Such a person is to meet all requirements of the existing naturalization laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required, (2) the petition may be filed in any court having naturalization jurisdiction regardless of the petitioner's residence, (3) the petitioner shall not be required to speak the English language or sign in his own handwriting, and (4) no fee shall be required of him in connection with the naturalization. There must be affidavits of two citizens as to the petitioner's character and attachment to the principles of the Constitution and as to his being "well disposed to the good order and happiness of the United States." The fact of service is to be established by affidavits of at least two citizens, members or former members during the present war of the military or naval forces, of the non-commissioned or warrant officer grade or higher,²⁹ or by an authenticated copy of the record of the executive department having custody of the record of the petitioner's service showing that he is or was during the present war a member serving honorably in the armed forces.³⁰ If the person is not within the jurisdiction of any court empowered to naturalize aliens, an authorized representative of the Immigration and Naturalization Service may conduct the proceedings and issue certificates. Records of such proceedings are to be filed with the clerk of a naturalization court in the district in which the petitioner is resident.

The privilege of naturalization under this legislation is to be denied to any person dishonorably discharged from the service or one discharged therefrom on account of alienage, or to "any conscientious objector who performed no military duty whatever or refused to wear the uniform." One who is dishonorably discharged from the service subsequent to his naturalization under these provisions may have his citizenship revoked.

Authorized agencies in the War Department and the Department of Justice (Immigration and Naturalization Service) have taken steps to give effect to the new legislation. Commanding officers are to make known the plan to aliens in their respective commands.³¹ The fact of three months of service is ordinarily to be established as a condition of naturalization, but this requirement as to time may be waived in the case of one serving over seas.³² The War Department's construction of the law to apply to "eligible

²⁹ These individuals may be the two citizens who make affidavit as to the alien's good character and attachment to the principles of the Constitution.

³⁰ Petition must be filed not later than one year after the termination of effectiveness of the Second War Powers Act, 1942.

³¹ War Department Circular No. 120, April 24, 1942.

³² An Act of May 9, 1919, had permitted the filing of petition by an alien in the military

and worthy noncitizens" within the forces suggests an element of discretion on the part of the officers certifying. It is understood that the Immigration and Naturalization Service has construed the words "lawfully admitted" and "resident," as used in the statute, to include aliens who are in the country with student visas. That part of the plan which permits purely administrative naturalization of men who are outside the jurisdiction of any "naturalization court" is apparently to be exercised with some discretion in the officers conducting the proceedings.

The move which the United States has made toward granting its citizenship without delay to persons who serve willingly in its armed forces is consistent with international law and seems thoroughly desirable from the point of view of liberal policy. The plan seems adequately safeguarded against abuses. It should help to avoid anomalies which have been possible in the past. It permits the addition to the citizenry of a considerable number of individuals who, without being compelled to do so, have elected to enjoy the opportunities which the country offers and to bear their share of responsibility for its protection.

ROBERT R. WILSON

VESTING ORDERS UNDER THE FIRST WAR POWERS ACT, 1941

Title III of the First War Powers Act, 1941, approved December 18, 1941, amends Section 5 (b) of the Trading With the Enemy Act of 1917 so as to provide, among other things, that during the time of war or during any other period of national emergency declared by the President

any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States.

The authority thus conferred upon the President was delegated by him on February 12, 1942, to the Secretary of the Treasury, who had previously been entrusted, under a series of executive orders beginning on April 10, 1940, with the "freezing" and regulation of foreign funds in excess of seven billions of dollars, or approximately fourteen times the value of all the property which came into the hands of the Alien Property Custodian during World War I under the provision in Section 7 (c) of the Trading With the Enemy Act of 1917 that the property of enemies or allies of enemies should, if so ordered by the President, be conveyed, transferred, assigned, or paid over to the Alien Property Custodian or seized by him.

In the exercise of his new authority, the Secretary of the Treasury, on February 16, 1942, issued an order vesting in himself 97% of the outstanding

service of the United States and outside the jurisdiction of any court authorized to naturalize aliens. 40 Stat. 542, 543.

shares of the stock of the General Aniline and Film Corporation, a corporation organized under the laws of the State of Delaware. The order of February 16, 1942, contained findings that the shares vested thereunder were the property of nationals of a foreign country designated in the executive order of April 10, 1940, as amended,¹ and that the action taken was in the public interest. It declared that the shares vested in the Secretary of the Treasury and any proceeds of those shares would be held in a special account pending further determination by the Secretary, who specifically reserved the power to return the shares or the proceeds thereof or to indicate that compensation would not be paid in lieu thereof in the event of a determination that such return or compensation should be made. The right to file a notice of claim, with a request for hearing thereon, was accorded to any person (other than a national of a foreign country designated in the executive order of April 10, 1940, as amended) asserting any interest in the shares or to any party asserting any claim as a result of the vesting order.

In a press release bearing the same date as the order it was stated that in the judgment of the Secretary of the Treasury the real interest in the shares vested in him was German, notwithstanding the fact, set forth in the order, that more than 2,500,000 of the shares were registered in the name of Dutch and Swiss concerns and only 4,000 shares were registered in the names of German nationals. The purpose of the Treasury Department in vesting these shares was, according to the press release, "to carry forward recent steps to Americanize the company and better utilize the productive facilities of the company in the war effort." The action was also "intended to protect the investment of the American bondholders," who held approximately 95% of the outstanding bonds and debentures of the company. The press release concluded with the announcement that "the question of ultimate disposition of the property sequestered is being left open"; that claims may be filed with the Secretary of the Treasury; and that regulations providing an orderly determination of such claims have been issued.

The vesting order of February 16, 1942, was not affected by the executive order of March 11, 1942, by which the power of vesting foreign property and interest therein, under the Act of December 18, 1941, was transferred from the Secretary of the Treasury to a new officer to be known by the title of Alien Property Custodian. Any property or interest therein subject to the control of the Secretary of the Treasury under the vesting order of February 16, 1942, or otherwise, is, by the terms of the executive order of March 11, 1942, to be released to the Alien Property Custodian upon written notice by

¹ The designation of foreign countries in the order of April 10, 1940, as amended up to December 26, 1941, included every country on the European Continent with the exception of Turkey. It also included China, Japan, Thailand and Hongkong. The Union of Soviet Socialist Republics was relieved of the freezing restrictions upon its entry into the war. British and American territories occupied by the Japanese were added to the list of "blocked countries" after our entry into the war.

him to the Secretary of the Treasury. The power transferred to the Alien Property Custodian on March 11, 1942, was redelegated by him to the Secretary of the Treasury on the same date, pending the staffing and organization of the Office of the Alien Property Custodian. The first vesting order of the Alien Property Custodian was issued on March 25, 1942. This order followed precisely the form which had been used in the vesting order of February 16, 1942. The property affected was that of I. G. Farbenindustrie, "an enemy corporation", and others. It consisted of "all right, title and interest" of that corporation and others in specified contracts, agreements, patents, capital stock, etc., largely related to the production of motor fuels, oils and synthetic rubber.

The guarded terms of the orders of February 16 and March 25, 1942, indicate that the officers who have been entrusted with the responsibility for the vesting of foreign property under the First War Powers Act, 1941, are aware of the questions of constitutional and international law which may arise in connection with the discharge of that responsibility. These questions are somewhat complicated by the fact that the vesting power conferred upon the President is not limited by the statute to periods of war but may be exercised during any other period of national emergency declared by the President. In view of the fact that the reference to periods of national emergency other than war was inserted in the Trading With the Enemy Act during the financial crisis of 1933, and in view of the circumstances in which the recent amendment was made, it is reasonable to assume, for the purposes of the interpretation and administration of the amended provision, that Congress intended by that provision to exercise, at least to a limited extent, its constitutional power to "make rules concerning captures on land and water" during war. In the exercise of that power, as long ago pointed out by Chief Justice Marshall in *Brown v. United States*, 8 Cranch 110, Congress might have confiscated the property of the enemy wherever found. That power does not, however, extend to the confiscation of the property of alien friends²; and, in the light of "the humane and wise policies of modern times" referred to in *Brown v. United States* and in later cases, including *Cummings v. Deutsche Bank*, 300 U. S. 115, 123, it could hardly be believed that Congress intended to confiscate any of the property the vesting of which it authorized in the recent amendment. The vesting of property, "when, as, and upon the terms, directed by the President," must, in the circumstances, be deemed to have been authorized in contemplation of subsequent provision for compensation to non-enemy owners and either compensation or credit (against claims) to enemy governments. Such provision might be made under rules and regulations to be prescribed by the President. It would be preferable that it be included in supplemental legislation, which might also appropriately set forth in detail the standards of judgment which Congress desires the Executive to apply in the administration of the Act.

² *Russian Volunteer Fleet v. United States*, 282 U. S. 481.

The questions of international law which may arise, now or later, in regard to vesting orders issued under the Act of December 18, 1941, include the following:

1. To what extent may our Government interfere with the property rights of foreign individuals and concerns without affording grounds for claims to indemnification under general international law?

2. To what extent does the standard imposed by general international law in this respect differ from the standard accepted by our Government in treaties in which the nationals of certain countries are assured that their property in this country shall not be taken without due process of law and without payment of just compensation?

3. To what extent does the position of nationals of countries with which we are at war differ, as regards the action of our Government with respect to their property, from the position of other foreigners?

4. What consequences attach to the vesting of property claimed by foreign governments?

It is a well recognized principle of general international law that interference with foreign property in the exercise of police power does not afford grounds for claims to indemnification. As stated by Mr. Herz, in an article in this JOURNAL,³ it may often be difficult to ascertain whether interference with private property in purported exercise of the police power is actually necessary for the protection of the public against a direct danger threatening its safety or is in reality expropriation for public use. "Injuries sustained by private property as a direct result of belligerent acts . . . or incidental thereto are not the subject of indemnification."⁴ The destruction of buildings as a sanitary measure falls within the same rule.⁵ The seizure and destruction of property to prevent its falling into the hands of the enemy do not give the owner a right to compensation if the danger was immediate and impending and its capture by the enemy was reasonably certain.⁶ "The line between over-ruling necessity in the face of immediate danger and deliberate destruction for the ultimate end of preventing . . . capture by the enemy is often exceedingly vague, so that courts and commissions in numerous cases have considered such destruction under the latter head as an expropriation of private property for the public use and have awarded indemnities to the owner."⁷ The authorities cited in relation to military appropriations are applicable in principle to any interference with property

³ "Expropriation of Foreign Property", Vol. 35 (1941), 243, 252.

⁴ Borchard, *Diplomatic Protection of Citizens Abroad*, p. 256.

⁵ *Ibid.*, p. 257, citing *Hardman (Great Britain) v. U. S.*, this JOURNAL, Vol. 7 (1913), 879, in which it was held that "necessary acts of war do not imply the belligerent's legal obligation to compensate" but that "there is, nevertheless, a certain humanitarian conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favor."

⁶ *Ibid.*, p. 258, citing *Respublica v. Sparhawk* (1788), 1 Dallas 357, 362, and Final Report of Spanish Treaty Claims Commission, May 2, 1910, p. 12.

⁷ *Ibid.*, p. 265.

in reliance upon the "rights of necessity" which, the court held in *Respublica v. Sparhawk*, "form a part of our law". The officers charged with the responsibility for the vesting of foreign property may lay the foundation for numerous claims under international law unless they hew closely to the line between measures necessary to avert impending danger and measures constituting the taking of private property for public use.

Our treaties with a number of countries, including Germany, Hungary, Finland, Estonia, Latvia, Norway, and Poland,⁸ contain the following provision:

The nationals of each high contracting party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

The standard of treatment recognized in the first of the two sentences quoted is the standard of general international law. The second sentence assures to nationals of each high contracting party the standard of treatment which has been recognized by our Supreme Court as the right of all friendly aliens in the United States.⁹ Due process of law does not require the following of any prescribed course of procedure. It does, however, import a guarantee of essential safeguards against a denial of justice.¹⁰

The rights of nationals of Germany and Hungary with respect to action by our Government affecting their property are as broad as the rights of any other foreigners if the provision quoted above from our treaties with Germany and Hungary are still in force. In the absence of specific denunciation, this provision might be deemed to be reconcilable with a state of war, and in view of the enlightened doctrine set forth in *Techt v. Hughes*, 229 N. Y. 222, 240-247, it may be considered to be still in effect. According to the standard of general international law, on the other hand, the nationals of countries with which we are at war are liable to the confiscation of their property by Congress, subject only to the above-mentioned "humane and wise policies of modern times". The Act of December 18, 1941, was, as noted above, an exercise of the power of Congress "to make rules concerning captures on land and water". That power, however, has not yet been exercised by the Congress to the extent of confiscating the property of enemies. The statement in the Treasury Department press release of February 16, 1942, that the property vested in the order of that day is considered to be "sequestered" is an indication that the full rigor of war is not yet being applied to the property of alien enemies.

⁸ 44 Stat. 2132, 2379, 2441; 45 Stat. 2641; 47 Stat. 2135; 48 Stat. 1507; 49 Stat. 2659.

⁹ *Russian Volunteer Fleet v. United States*, *supra*.

¹⁰ Compare Borchard, *op. cit.*, p. 100; Cowles, *Treaties and Constitutional Law, Property Interferences and Due Process of Law*, p. 2.

The decree of the Royal Netherlands Government in exile, dated May 24, 1940, vesting in the Netherlands State title to all Dutch property interests outside Europe, entails the possibility of a violation by our Government of the principle, established by the decision of the Supreme Court in *Schooner Exchange v. McFaddon*, 7 Cranch 116, and consistently recognized since the date of that case, that the property of a foreign state is immune from interference while in the territory of the United States. If extraterritorial effect is conceded to the Netherlands decree of May 24, 1940, the majority of the shares vested in the Secretary of the Treasury by his order of February 16, 1942, may possibly be regarded as belonging to the Netherlands State. The claim of the Netherlands State is not likely to be pressed under existing circumstances, but it may lead to extensive discussion and possible arbitration after the return of normal conditions.

EDGAR TURLINGTON

CURRENT NOTES

ANNUAL MEETING OF THE SOCIETY

In accordance with the notice published in the last number of the JOURNAL, and with the previous notification by mail to all members, the American Society of International Law held its Thirty-Sixth Annual Meeting at Washington on Saturday, April 25, 1942. As indicated in the notice, there was no formal program of discussions. The attendance was unexpectedly large, in view of prevailing conditions, there being about two hundred and twenty-five present, including a large number of members from out of town. During the two and a half hours the Society remained in session, reports were received from officers and committees, upon which there was some lively discussions, and new officers were elected.

Because of the limitation of the term of office of the President of the Society to three years, now a part of the Society's Constitution, it was necessary to elect a successor to Secretary of State Cordell Hull. For this distinction, the Society elected as its fifth President, Frederic R. Coudert, of New York. Mr. Coudert is one of the original members of the Society and has been most active in its affairs from the beginning. He has presided at many of the Society's annual banquets and has become its most beloved toastmaster. For many years Mr. Coudert has been an Honorary Vice-President. His selection as President met with cordial and unanimous approval.

The Society adopted the following resolution expressing its appreciation of Mr. Hull's services during the stormy period he has been also at the helm of the ship of state:

Resolved, That the American Society of International Law expresses its cordial thanks and grateful appreciation to the Honorable Cordell Hull, Secretary of State of the United States, for devoting so much of his valuable time to the interests of the Society and giving it the benefit of his wise counsel and leadership during three of the most difficult years filled with epoch-making events in the international relationships of the United States.

Mr. Hull was elected an Honorary Vice-President.

For the information of the members of the Society, the Secretary quotes the following acknowledgment of the above resolution which he received from Mr. Hull:

THE SECRETARY OF STATE
WASHINGTON

May 14, 1948

My dear Mr. Finch:

I am in receipt of your letter of May 12, 1942 advising me of the resolution adopted by the American Society of International Law at its meeting on April 25, 1942 expressing its appreciation of my services as President of the organization for the past three years, and informing me of my election as an Honorary Vice President of the Society.

I beg that you will convey to the Society my gratification at the action taken, and assure it that my only regret is that the condition of the times made it impossible for me

to do as much as I had hoped to do in the promotion of the praiseworthy work of the organization. Any service that I may have been able to render was made possible only by the splendid coöperation of yourself and other officers of the Society. It was a pleasure for me to be associated with such an intelligent group of people so intensely interested in a subject which has been very much upon my mind the past several years. I greatly appreciate the Society's expression, through you, of solicitation as to my health and future service.

Sincerely yours,

CORDELL HULL

Mr. GEORGE A. FINCH,
Secretary, American Society
of International Law,
700 Jackson Place, N. W.,
Washington, D. C.

A note of sadness occurred when the Secretary read a letter from Dr. Jesse S. Reeves stating that because of the state of his health he could not continue in the active positions he held with the Society. It was therefore necessary to elect his successor as an active Vice-President, and for this honor, the Society elected Dr. Charles G. Fenwick, an active member of the Society for many years, including service on the Board of Editors of its *American Journal of International Law*. Lately Dr. Fenwick has been the United States representative on the Inter-American Neutrality Committee at Rio de Janeiro, the name of which has been recently changed to the Inter-American Juridical Committee. Mr. Reeves was made an Honorary Vice-President of the Society.

The other officers of the Society were reelected, and the following members were added to the Executive Council: Willard B. Cowles, Edwin D. Dickinson, Edward Mead Earle, D. F. Fleming, Green H. Hackworth, Philip C. Jessup, Pitman Potter, Helen Dwight Reid, Quincy Wright.

The following letter from the President of the Brazilian Society of International Law was read:

[Translation]

RIO DE JANEIRO, January 3, 1942

The President of the American Society of International Law:

The Brazilian Society of International Law, of which I have the honor to be President, unanimously adopted at its last meeting a vote of solidarity with the United States because of the aggression which it had just suffered by a Power from another continent.

It is with great pleasure that I communicate this resolution to Your Excellency, with the request that you kindly bring it to the attention of all the members of the American Society of International Law.

I avail myself of this opportunity to reiterate to Your Excellency the assurances of my highest esteem and distinguished consideration.

AFRANIO DE MELLO FRANCO
President

His Excellency Mr. Cordell Hull,
President, American Society of International Law.

The Secretary also read the reply to this letter sent by the Honorable Cordell Hull, President of the Society, as follows:

AMERICAN SOCIETY OF INTERNATIONAL LAW
700 JACKSON PLACE, N. W., WASHINGTON, D. C.

February 4, 1942

My dear Mr. President,

I have received with the greatest pleasure your letter of January 3, 1942, conveying to me in your capacity as President of the Brazilian Society of International Law the unan-

imous vote of solidarity with the United States which your distinguished Society has adopted in view of the aggression which the United States has so unjustly suffered by the action of a non-American Power.

In accordance with your request, I shall communicate the contents of this resolution to the members of the American Society of International Law, and I can assure you in advance that all the officers and members of the Society deeply appreciate this prompt and sincere expression of solidarity on the part of the members of your Society, to whom I shall ask you to convey our deepest appreciation.

Please allow me also, my dear Dr. de Mello Franco, personally to thank you, as well as on behalf of the members of the American Society of International Law, for this generous action.

With renewed assurances of my most distinguished consideration, I am,

Sincerely yours,

CORDELL HULL
President

The Honorable
Dr. AFRANIO DE MELLO FRANCO,
1424 Avenida Copacabana,
Rio de Janeiro, Brazil.

A resolution was adopted expressing appreciation of and reciprocating the sentiments expressed by the Brazilian Society of International Law.

The policy of the Society with regard to meeting during the war was fully considered. A recommendation was made to the Executive Council that a full meeting be held next year to discuss international law largely in its relation to the present situation and international organization in the future. Later, in the afternoon, the Executive Council adopted the following resolution:

Resolved, That the Executive Council recommends to the Committee on Annual Meeting:

- (1) That the meeting of the Society be not less than two days long.
- (2) That the Secretary and the Committee on Annual Meeting take into earnest consideration the possibility of the annual meeting being held away from Washington, and to this end that the membership of the Society be polled upon their desire whether the meeting next year should be held in Washington or should be held away from Washington, and if so, where.
- (3) That the annual meeting be devoted to important current problems of international law and more particularly to the methods by which international law can be strengthened and upheld in the future.
- (4) That the Committee on Annual Meeting study methods whereby something of the character of round-table discussions may be provided for technical problems not falling within the preceding paragraph, and that if necessary, separate sections be provided for particular topics of this character.

Another subject which received the most serious consideration came up on the report of the Society's Committee on Publications of the Department of State. In approving this report, the Society reiterated its conviction of the importance of the publication of significant state papers at the earliest moment which the Department of State may consider to be consistent with the public interest. The Society voted also that "This Society would deprecate any delay in the publication of any document or information which

the Department decides it is possible, without danger to the public interest, to release." This action was most timely, for a few days later it was learned that the Senate had made a 40% reduction in the sum appropriated by the House of Representatives for printing and binding of the Department of State. The Society's interest in maintaining the Department's appropriation for this purpose was promptly brought to the attention of the conferees on the Appropriation Bill by the Society's Committee, assisted by other officers. Their interposition was most effective, for, as will be seen from the final report of the Society's Committee printed in the *Proceedings*, the conferees restored all the appropriation except 10%, and this year's appropriation is in fact larger than the appropriation for the same purpose made last year.

Two other actions of the Society at its annual meeting on April 25 will be of interest to the members.

A Special Committee was appointed to consider the desirability of establishing sustaining or other forms of membership in the Society as a means of obtaining additional financial support. Mr. John Maktos was appointed Chairman of this Committee, with Helen Dwight Reid and Elton Atwater as additional members.

A committee was also appointed to consider the coöperation of the Society with other organizations in accordance with Article II of the Society's Constitution. The following were appointed members of the Committee: Amos J. Peaslee, Chairman; Edward W. Allen, John P. Bullington, Arthur K. Kuhn, John T. Vance. At the same time, the Society voted to accept membership in the Inter-American Bar Association.

The Committee on Nominations for the ensuing year was elected as follows: Athern P. Daggett; Charles Fairman, John Maktos, William R. Vallance, Sarah Wambaugh. The membership of other committees will be found in the printed *Proceedings* of the meeting.

Mr. Edgar Turlington, of Washington, D. C., was elected a member of the Board of Editors of the *American Journal of International Law* to fill the vacancy caused by the retirement of Mr. Reeves.

At its meeting following the adjournment of the Society, the Executive Council adopted the following resolution felicitating Mr. George Grafton Wilson upon his long and devoted service to the Society and its JOURNAL:

Resolved, That the Executive Council of the American Society of International Law felicitates Mr. George Grafton Wilson, an Honorary Vice-President and member of the Council, upon entering his eightieth year, that it is a source of the greatest satisfaction that he has been able so long to continue his active service on the Board of Editors of the *American Journal of International Law*, beginning with the founding of the Journal in 1907, and serving as Editor-in-Chief since 1924, and the Executive Council expresses its gratification that Mr. Wilson is now entering upon his thirty-seventh year of devoted service to the Society and its Journal.

The Society's Thirty-Sixth Annual Meeting closed with a joint luncheon attended by its members and the members of the Section of International and Comparative Law of the American Bar Association. The luncheon was held at the Carlton Hotel, where the meeting of the Society also took place. Some two hundred and fifty members and guests were present. Mr. Frederic R. Coudert, the new President of the Society, presided, and the speakers were the Honorable Francis Biddle, Attorney General of the United States, Philip C. Jessup, Professor of International Law at Columbia University and an active member of the Society and Editor of its *JOURNAL*, and the Honorable Evan E. Young, Vice-President of Pan American Airways and formerly of the United States diplomatic service, who was introduced by Mr. David E. Grant, Chairman of the Section of International and Comparative Law of the American Bar Association. The themes of the addresses of all of these speakers were the function of the international lawyer during the war and the position of international law in the post-war world.

The complete proceedings of the meeting and the luncheon, including the discussions, the addresses, the reports of officers and committees, as well as the minutes of the three meetings of the Executive Council held during the year, are now available in the usual form of printed annual *Proceedings*, which may be obtained from the undersigned Secretary for the subscription price of one dollar and fifty cents.

GEORGE A. FINCH
Secretary

PEACEMAKING IN 1815

The struggle waged for more than twenty years by the peoples of Europe against Revolutionary and later Napoleonic France purported to destroy a system of political hegemony in which peace treaties were but "truces" lacking "that religious faith, that sacred inviolability on which depends the reputation, the strength and the preservation of empires."¹ The positive aim of the successive coalitions against France was the organization of a European system of independent states, secured and held together by a just distribution of political forces according to the principles of the balance of power. The first coalition of 1793 named among its objectives the erection of a "barrier against the unjust aggression of France."² The second coalition of 1798-99 was concluded "to bring about a solid peace with the re-establishment of the balance of Europe."³ The general purpose of the treaty

¹ Preamble to the Russo-Prussian Alliance of Feb. 28, 1813. (Martens, *Nouveau Recueil des Traités*, *Série I*, Vol. III, p. 234.) For a detailed analysis of the political and legal nature of the hegemonial system of France under the Republic and the Empire, see Triepel, *Die Hegemonie* (Stuttgart, 1938), p. 523 ff.

² Convention between His Britannic Majesty and the Empress of Russia, March 25, 1793. (Martens, *Recueil des Traités*, Vol. V, p. 438.)

³ Provisional Treaty between Great Britain and Russia, Dec. 29, 1798. (Martens, *Recueil des Traités*, Vol. VI, p. 557.)

of the third coalition of 1805 was stated to be "the restoration of the safety and tranquillity of Europe on solid and permanent foundations."⁴ It included a detailed plan of the future territorial organization of Europe which in many respects anticipated that actually achieved in Vienna a decade later.⁵ The coalition of 1813 became that "Great European Alliance" which Pitt and the Russian Czar had sought to create in 1805. When the representatives of the Allies met at Châtillon from February until March, 1814, to discuss peace terms with France, they declared that they were "presenting themselves at the Conferences not simply as delegates of the four Courts which had vested them with full powers, but as being charged to negotiate the peace with France on behalf of Europe, now forming but one single whole."⁶ The object of the coalition was, in conformity with the preceding alliances, the restoration of the political independence of the European states. "The total destruction of the hostile forces which had penetrated into the heart of Russia has prepared that great epoch of independence for all the states which shall desire to seize the occasion to throw off the French yoke which for so many years has weighed upon them."⁷ The peace project of Châtillon provided for a solemn engagement on the part of the allied powers "to recognize the principle of the sovereignty and independence of all states."⁸ The preamble to the Peace Treaty of Paris of May 30, 1814, proclaimed that it was the desire of the Allies "to put an end to the long disturbance of Europe and to the suffering of the peoples by a stable peace based upon a just division of forces between the powers and carrying with it the

⁴ Treaty of Alliance between Great Britain and Russia, March 30, 1805. (Martens, *Recueil des Traités et Conventions conclus par la Russie avec les Puissances Étrangères*, Vol. II, p. 421 ff.)

⁵ See the Communication from the British to the Russian Government of Jan. 19, 1805, relative to their Plan of Concert against France, and for the General Pacification of Europe (British and Foreign State Papers, Vol. II, p. 341 ff.) The principal features of this plan were the reduction of France within her former limits, the creation of barriers in the Netherlands and in Switzerland, and the reestablishment of a general system of public law in Europe. These "Bases of Pacification" had to be accepted in advance by those states which subsequently acceded to the alliance. (See Austria's declaration of accession of July 28, 1805. Martens, *Recueil des Traités et Conventions conclus par la Russie*, Vol. II, p. 428.) At the end of the war, a "General Congress" was to meet whose task it would be to establish a "federal system" among the European states as the most effective guaranty of their mutual independence. (Separate Art. VI of the Anglo-Russian Treaty. Martens, *loc. cit.*, p. 442.)

⁶ For minutes of the conferences, see Angeberg, *Le Congrès de Vienne et les Traités de 1815* (Paris, 1864), p. 105 ff.

⁷ See the Treaty between Russia and Prussia of February, 1813. (Martens, *Nouveau Recueil des Traités, Série I*, Vol. III, p. 234.) The aim of the Quadruple Alliance between Russia, Austria, Great Britain and Prussia, concluded at Chaumont after the breakdown of the peace negotiations with Napoleon, was "to maintain the balance of power, and to secure the tranquillity and independence of the European states." (See Descamps-Renault, *Recueil international des Traités*, Vol. I, p. 310.) See also the declaration issued by the Allies on March 25, 1814, at Vitry, proclaiming the reasons for the continuation of the war. (Angeberg, *op. cit.*, p. 143.)

⁸ Angeberg, *op. cit.*, p. 111.

guaranty of its permanence."⁹ Only the general outlines of the future European order were set forth in the peace treaty; a congress "of all the Powers engaged on one side or the other in the war" was to complete those preliminary arrangements.¹⁰ The "Big Four," Austria, Great Britain, Russia, and Prussia at first tried to prevent the congress from becoming a general assembly of the European states. At a conference held at Vienna on September 22, 1814, their representatives declared that the Allied Powers alone were to decide on the distribution of the provinces that had become available as a result of the late war and the Treaty of Paris. France and Spain, in their capacity as Powers of the first order and as "friendly and non-hostile parties," would be allowed to raise objections after the Allies had reached their conclusions; the other signatories of the Peace Treaty were to have no voice at all in the negotiations.¹¹ Talleyrand, the French representative, succeeded in convincing the statesmen assembled in Vienna that, after the overthrow of Napoleon and the restoration of the Bourbon dynasty, the Great Alliance had lost its *raison d'être* and, therefore, had ceased to exist; that the notion of "allied powers" as opposed to other states had to be given up in favor of a community of European states possessing equal rights in the process of reconstructing Europe.¹² The Congress eventually was formed by the eight signatories of the Peace Treaty; France was admitted on equal terms with the Allies.¹³ On October 30, 1814, a "Committee of Eight" was constituted.¹⁴ Its function was to consider all matters "of European significance," or questions "concerning the larger interests of Europe, *viz.*, the relations among the Powers themselves, the territorial adjustments, the fixing of boundaries, and the disposal of territories provisionally occupied and administered by the Allies."¹⁵ The preparatory work was entrusted to committees composed of

⁹ Angeberg, *op. cit.*, p. 161.

¹⁰ Art. XXII of the Treaty of Paris. In addition, No. 1 of the Separate and Secret Articles to the Peace Treaty defined the task of the Congress in the following terms: "The disposal of the territories given up by His Most Christian Majesty . . . and the relations from whence a real and permanent Balance of Power in Europe is to be derived shall be regulated at the Congress upon the principles agreed upon by the Allies among themselves." The last sentence referred to certain agreements among the Allies with regard to the future territorial readjustments in Europe, for instance, the secret and separate articles of the Chaumont Alliance (Descamps-Renault, *op. cit.*, p. 310) and the Convention of Troyes of Feb. 15, 1814 (British and Foreign State Papers, Vol. I, p. 119), whereby England gained recognition of her plans with respect to the political organization of the Netherlands.

¹¹ Angeberg, *op. cit.*, pp. 249 ff.

¹² The principles of France's policy during the Congress were laid down in the famous Instruction of Louis XVIII to his representative (Angeberg, *op. cit.*, p. 215). See, furthermore, Talleyrand, *Mémoires (publiés par le Duc de Broglie)*, Vol. II, pp. 280, 320, 327; letter of Talleyrand to the British plenipotentiary of Oct. 5, 1814 (Angeberg, *op. cit.*, p. 270); Capéfigue, *Le Congrès de Vienne dans ses rapports avec la circonscription actuelle de l'Europe* (Paris, 1847), p. 27.

¹³ "Five months after the Allies had entered Paris, France had regained her due place in the councils of Europe." (Talleyrand, *Mémoires*, Vol. II, p. 283.)

¹⁴ Angeberg, *op. cit.*, p. 358.

¹⁵ See the Agreement among the four Courts concerning the Forms of the Congress. An-

states immediately concerned with a particular issue.¹⁶ Thus, Austria, Prussia, and Russia dealt with the Polish question in a special conference "on the affairs of Poland and Saxony" with Great Britain in the rôle of disinterested mediator.¹⁷ When the antagonism among the three eastern Powers threatened to split the committee, the French representative was admitted to its deliberations.¹⁸ From January, 1815, on, this "Committee of Five" was, in Gentz' words, the "only and real Congress."¹⁹ It decided upon all matters of European importance. The original "Committee of Eight" was revived only during the last stage of the Congress when the Final Act—a document containing the more important provisions of various separate agreements—was submitted to it for approval and signature.²⁰

The balance of power to be realized through the decisions of the Congress consisted, in Talleyrand's striking phrase, in a "relation between the forces of resistance and the forces of aggression of the various political entities."²¹ The weak states had to be strengthened, and barriers had to be erected against the strong. Not the "convenience" of the individual states was the determining factor, but the "general interests of Europe."²² Prussia, whose main interests lay in the east, was compelled to assume the "watch on the Rhine" because her military strength was considered indispensable to check French aggression in this part of Western Europe.²³ The Belgians, who previously had expressed their desire to be placed again under the ancient rule of the House of Hapsburg, were united with the Netherlands in an attempt to form a strong barrier against France on her northern frontier.²⁴ The Ger-

nex to the Protocol of Sept. 22, 1814 (British and Foreign State Papers, Vol. II, p. 556).

¹⁶ Klüber, *Übersicht der diplomatischen Verhandlungen des Wiener Kongresses* (Frankfurt, 1816), p. 43 ff.

¹⁷ Minutes of the proceedings in British and Foreign State Papers, Vol. II, p. 579 ff.

¹⁸ After the conclusion of the Treaty of Alliance between Austria, Great Britain and France against Russia and Prussia. Jan. 3, 1815. (Angeberg, *op. cit.*, p. 589.)

¹⁹ Prokesch-Osten, *Dépêches inédites du Chevalier de Gentz aux Hospodars de Valachie* (Paris, 1876), Vol. I, p. 161. The minutes of its proceedings in British and Foreign State Papers, Vol. II, p. 602 ff.

²⁰ Angeberg, *op. cit.*, p. 1218; W. A. Philipps, *The Confederation of Europe* (London, 1920), p. 101.

²¹ This formula is used in the Instruction of Louis XVIII (Angeberg, *op. cit.*, p. 215); similar terms in Talleyrand's letter to Metternich of Dec. 19, 1814 (Angeberg, *op. cit.*, p. 540). See also Metternich's note of Jan. 28, 1815 (Angeberg, *op. cit.*, p. 677).

²² See the conversation between Talleyrand and the Emperor Alexander of Russia (Talleyrand, *Mémoires*, Vol. II, p. 327); furthermore, Donnadieu, *Essai sur la théorie de l'équilibre* (Paris, 1900), pp. 121, 138 ff., 148, 155, 157 ff.; Ranke, *Denkwürdigkeiten des Staatskanzlers Fürst Hardenberg* (Leipzig, 1877), Vol. IV, p. 438; Schnabel, *Deutsche Geschichte im XIX. Jahrhundert*, Vol. I, p. 562 f.

²³ Memorandum of the Prince of Hardenberg, Feb. 8, 1815. (Angeberg, *op. cit.*, p. 707.)

²⁴ Preamble to the Treaty of May 31, 1815, between the four Allies and the Kingdom of the Netherlands (Descamps-Renault, *op. cit.*, p. 412). Furthermore, Castlereagh's note to Baron von Gagern, plenipotentiary of the Netherlands at the Congress, of Oct. 5, 1815 (Colenbrander, *Onstaan der Grondwet [1909]*, Vol. II, p. 653: "The inhabitants of these interesting provinces will have the satisfaction and the glory, under the House of Orange,

manic Confederation was created to give Central Europe that force of resistance, the lack of which was held to have been the principal cause for Napoleon's advance towards the east.²⁵ Switzerland was neutralized "in the interest of the European security."²⁶ Vanquished France was "restored to the dimensions which centuries of glory and prosperity under the rule of her kings have assured her"; she was "to share with Europe the blessings of liberty, national independence and peace."²⁷ No lost provinces were associated with the restoration of her former dynasty.²⁸

The work of the Congress of Vienna represents a remarkable achievement in the art and technique of peacemaking. This was clearly realized by Gentz who wrote shortly after the conclusion of the Congress:²⁹

If ever the Great Powers should gather again to establish a political system designed to consolidate and to preserve the public order in Europe and calculated to prevent those disturbances which wars of ambition and conquest inflict upon nations, a system that would assure to each state its rights through universal sanction and measures of collective protection—if ever such work should be accomplished, the Congress of Vienna, considered as a preparatory assembly, will not have been without usefulness.

JOACHIM VON ELBE

again to constitute that European barrier, under the protection of which the liberties of other nations, as well as their own, may hereafter securely rest.")

²⁵ W. von Humboldt, Memorandum on the Affairs of the Germanic Confederation, Frankfurt, Sept. 30, 1816. (*Gesammelte Schriften*, Vol. XII [Berlin 1903], p. 53.)

²⁶ Declaration regarding Swiss neutrality, March 20, 1815, and Nov. 20, 1815. (Angeberg, *op. cit.*, pp. 934, 1640.)

²⁷ Declaration of the Allies issued at Vitry on March 25, 1814. (Angeberg, *op. cit.*, p. 143.)

²⁸ Marriott, *The Remaking of Modern Europe* (London 1909), p. 126; Philipps, *op. cit.*, p. 77.

²⁹ In his "*Tableau des divers actes et des derniers résultats du Congrès de Vienna.*" June 26, 1815. (Prokesch-Osten, *op. cit.*, pp. 152, 168.)

NICOLAS POLITIS.*

1872-1942

No history of the two first decades of the League of Nations can be written without paying tribute to the exceptionally great services rendered to the League from its very start by Nicolas Socrate Politis. He was one of those fortunate personalities who have combined an unfaltering patriotism and a most constructive spirit of true internationalism. Fifteen years in various French universities created his reputation as a great scholar and teacher of international law. In the turmoil of the first World War, he became Minister of Foreign Affairs of Greece, and in that capacity he took part in the Peace Conference of Paris. His learning and his diplomatic experience made of him one of the outstanding personalities in League circles and a creative statesman of world-wide reputation. His was the exceptionally good fortune to have taken a most active part in the framing of the Covenant under the chairmanship of President Wilson, and his was also the unique opportunity of devoting almost twenty years to the cause of the application of the Wilsonian principles in general practice.

After becoming Minister of Foreign Affairs, in 1916, he made the following year in the Greek Parliament a remarkable speech which was dominated by a clear distinction between the states that honored their signature and the others that had to be looked upon merely as "bands of pirates which all states have the right and the duty to outlaw." For obvious reasons, Politis had to leave unanswered the question how to punish these "pirates". Two years later, however, in the Peace Conference of Paris, an assuring solution seemed to be found: collective sanctions would be applied against a recalcitrant state. No decision of the conference was to Politis personally of greater practical bearing than the idea of sanctions. The vision of the definite supremacy of international law became to him the guiding principle in connection with whatever problems of security and disarmament the League of Nations discussed.

His first disillusionment, when in 1923, the Treaty of Mutual Assistance was shelved, caused him to concentrate all his forces in the drafting of the Geneva Protocol of 1924. Those of us, members of the First or the Third Commissions of the Assembly, who had the privilege of seeing Dr. Beneš and Politis, the *rapporteurs*, in full activity, will never forget their extraordinary skill in overcoming obstacles which seemed to be insurmountable, and their

* Resolution adopted by the Executive Council of the American Society of International Law, April 24, 1942:

Resolved, That the Executive Council has learned with great regret of the recent death of Mr. Nicolas Politis, long a member of this Society. Mr. Politis has also been for many years active in many other organizations devoted to the improvement of international law, and his scholarly contributions have been used and appreciated throughout the world. His death removes a valuable collaborator who will long be missed.—Eh.

devotion to a task expected to make safe the peace of the world. When finally the draft treaty, the "Protocol for the Pacific Settlement of International Disputes", was unanimously adopted by the Assembly, there never had been in the history of the League a moment of greater enthusiasm. The President of the Assembly, M. Motta, several times President of the Swiss Confederation, extended thanks to Politis, naming him both a scholar and a statesman, and, M. Motta went on, "he has a clear and penetrating intellect, the mind of a logician, and a measured eloquence of the Greek masters."

The subsequent disappearance of the Geneva Protocol, in 1925, compelled Politis to accept whatever small gain could be made for the cause of a future victory of international law. When the Council of the League, in 1926, appointed the Preparatory Commission for an early convocation of an international conference for the reduction and limitation of armaments and, in the following year, the Committee of Arbitration and Security, Politis was in both of them the most active member. It was fitting, therefore, that he became also the *rapporteur* in the Assembly when, in 1928, the new "General Act for the Pacific Settlement of International Disputes" was adopted.

The activities in general of the Preparatory Commission can be summarized in a brief remark that, as far as human intelligence and devotion are concerned, no efforts were spared with a view to preparing for the coming Disarmament Conference a considerable number of various proposals, including a complete draft convention to be used as a general basis of discussion in the conference. There is no reason to go into the merits of this voluminous document, as it was almost immediately replaced by the American and, subsequently, by the British proposals.

The year 1932 marked in any case a new milestone in the life of Politis. The Disarmament Conference met in February, and Politis became, as its Vice-President, the chief assistant of Mr. Arthur Henderson, the President of the Conference. In the following autumn, the Assembly of the League was convoked under most gloomy circumstances: Japan and Germany were seemingly going to embark on a most dangerous policy of their own. The post of the President of the Assembly, therefore, came to be considered exceptionally delicate. Politis was once more looked upon as the most suitable person to take over these responsibilities also. Let us listen to the following passage from his closing speech, on October 17, 1932:

In this place of honor . . . , I have been able to give free reign to my reflections . . . I was deeply impressed when I saw the delegates of the fifty-two States, represented here, at the call of their countries, pass gravely and silently by this platform to place their voting-papers in the ballot-box. Never more than from this chair have I felt the majesty of such a spectacle. As I contemplated it, I had a vision of the future and, I trust, of a near future, when all peoples will come here, not merely to elect their representatives, but to proclaim in the sight of God and man the completion of the great work in which we have been patient and obscure laborers—the reign of justice and peace on earth.

It certainly is easy to recognize this vision of Politis: it was a reflection of the lofty inspiration that had been the guidance of President Wilson during the great days of the Peace Conference in Paris. His close friends, however, knew to what an extent Politis privately feared the worst, and he was right. The inevitable had to come; Germany left definitely, in October, 1933, or exactly one year later, not merely the Disarmament Conference but the League of Nations as well. Politis' own analysis of the true causes of the failure of the conference is undoubtedly, at any rate for the time being, unsurpassed in skill and honesty. *The Problem of Disarmament* is, in fact, his personal *credo*. His pessimistic prophecy was the vision of a statesman of unusual perspicacity: "Peace is compromised. Our civilization is in danger. Our old world is moving towards its ruin. . . . If catastrophe comes . . . it will be general, or it will not be at all. It will spare no country." These conclusions were considered in various quarters to be too open propaganda; events, however, after 1938, have unfortunately proved to what an extent his pessimism was only too well founded.

In the meantime, Politis had boldly come to the conclusion as regards the primary cause of this confusion in world politics that it was above all due to the general belief in the traditional theory of sovereignty. It became to him self-evident that no world organization can be successful and no supreme rule of international law established as long as the conception of national sovereignty is practically omnipotent. Having scrutinized, chapter by chapter, in *Le Problème des Limitations de la Souveraineté*, the various aspects and details of the problems, he concludes that "la notion de la souveraineté constitue une formidable obstacle à l'organisation pacifique du monde." Since "le vieux dogme . . . est incompatible avec le droit et l'existence d'une communauté internationale", it is therefore that "un anathème général s'élève contre lui, qui le condamne irrémédiablement."

It goes without saying that there was no field of international law with which Politis was not entirely familiar. The central problem to him, however, out of which all the others were merely secondary emanations, was always the relation between the theory of sovereignty and international law. Everybody who accepts, at any rate in broad principles, the dynamic conception of international relations, must, as a matter of consequence, embrace the idea of the establishment, sooner or later, of international law above national sovereignty. Whoever believes in a theory of this kind, to him the thinking and action of Politis will be a matter of more or less complete concurrence. Thus, for example, Professor Charles Fairman, of Stanford University, stresses how "imperative is the need for men to resent every act of international violence as a threat to the security of us all. As that new loyalty grows, the national state, once called sovereign, will be found taking its appropriate place in a sound world order."¹

¹ Charles Fairman, "Sovereignty and Law," in Proceedings of the Institute of World Affairs, The University of Southern California, Los Angeles, 1941, Vol. XVIII, p. 249.

On the other hand, to those who look upon international relations chiefly from a static angle, Politis' attacks against the theory of national sovereignty are perhaps just as much anathema as, for example, automatic sanctions against a treaty-breaking state. In this latter alternative, there is, however, a reminder of particular actuality, namely, the fact of the so-called Briand-Kellogg Pact. Today, all the original signatory states of that treaty are at war, except Ireland. Thus either Politis was fundamentally right in his efforts to make international law the highest exponent of the international moral standard, including punitive measures against states he, in 1917, so frankly called "pirates," or he was wrong in fighting for the sacrifice of the traditional conception of national sovereignty with a view to gaining a definite victory for a civilized world organization.

The years from 1936 to 1938 seemingly prepared for Politis' retirement from diplomatic life. It was most likely for that purpose that he once more accepted the portfolio of Minister of Foreign Affairs in Athens. A new mission was expected to be offered him. A great number of his close friends had hoped to see him end his public career on the Permanent Court of International Justice. His profound learning was indisputable, his merits in practice by no means less prominent, thus everything making his election to the court merely a matter of formality. These plans, however, came too late, the second World War causing the adjournment *sine die* of the Assembly, in 1939. Even an election as late as that, however, would have been of no practical consequence. In June, 1940, the court was forced to seek temporary shelter in Switzerland. At the same time Politis himself had to leave Paris for good. He found refuge on the French Riviera, and it was there, in March of this year, that Nicolas Socrate Politis died at the age of three score years and ten, and humanity lost one of its most devoted, humble servants.

There is perhaps nothing more striking in the entire *curriculum vitae* of Politis than the fact that he has himself, more than anybody else, made his own career, from his modest paternal home in Corfu to the highest summits of world politics. It can, in fact, be safely asserted that no delegate to the League Assemblies or conferences, perhaps excluding Briand, was more thoroughly independent than Politis. When the Greek Government, in 1924, seemed to disapprove of his great personal rôle in the drafting of the Geneva Protocol, he, without any hesitation, much preferred to quit diplomacy to a submission to a control the intellectual quality of which could certainly not surpass his own capacity. His reappointment, in 1927, to Paris as Envoy Extraordinary and Minister Plenipotentiary and as Permanent Delegate to Geneva established definitely his full independence of judgment and freedom of action. It is in this particular light that his position in the League has to be understood. Whenever other leading personalities preferred to evade possible frictions or too great individual responsibilities, there was in every critical moment at the disposal of the League a great

personality *sui generis* to whom considerations of this delicate kind did not exist. Such an exceptional confidence in Politis presupposed, as a matter of course, that, whatever might happen, his would be the last word.

Whenever there has been an occasion to pay public tribute to Politis, no speaker has omitted to stress particularly the qualities of his intellect. Thus, for instance, when the Preparatory Commission, after five years of most strenuous labor, finally came to a conclusion, in December, 1930, its President, M. Loudon, the then Minister of Foreign Affairs of the Netherlands, addressed Politis in the following words: "When an international meeting has the privilege of counting among its members a Nicolas Politis, it can be sure of always finding a clear and accurate formula which, but for him, it might perhaps have to seek in vain." The reception of the published studies and works of Politis was always respectful, even in case of disagreement. One could meet all over the world diplomats and scholars unanimous in their praise for the exquisite quality of his lectures which they had attended at various institutions, in Paris or elsewhere. His facility in handling most complicated problems made him an ideal President, or *rapporteur* of Assemblies, conferences or commissions.

In fact, no true life history of Politis can be written without a most detailed scrutiny of his mind. His extraordinary learning being always scrupulously classified made his thinking of the highest quality, the expression of his views finding always a masterly form not merely of exactitude but lucidity as well. Even his conversations developed rather regularly into a general analysis of facts and not seldom to remarks attaining the heights of syntheticism. The harmonious balance in his mind included his whole emotional life and the refined domain of his feelings. It was not only his rare intellect but his tact as well that explains his most benevolent understanding of even those with whom his own views might have been at considerable variance. This harmony controlled just as much his character. There never was to be seen in him two personalities, one for the palaces of the heads of State or for other exclusive diplomatic gatherings, and another for the general public. Although a diplomat representing the best qualities of the "old school," he was simultaneously a modern statesman of the most democratic leanings. Nobody can apply to Politis the famous definition by Blaise Pascal of his contemporaries as "*diseurs de bons mots, mais mauvais caractères*."

When the resurrection of a civilized world organization comes, Nicolas Socrate Politis' services to its great cause will be remembered with deepest emotion and respect. Destiny had made him a great Greek: he has made himself an international personality whose inspiring memory will survive as long as the history of the League of Nations does not pass into oblivion.

RUDOLF HOLSTI

Former Minister of Foreign Affairs of Finland

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16-MAY 15, 1942

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

February, 1942

- 2 CANADA—SOVIET RUSSIA. Signed treaty providing for exchange of consular representatives. *B. I. N.*, Feb. 21, 1942, p. 153; *London Times*, Feb. 6, 1942, p. 3.
- 5 FRANCE (Vichy)—IRAN. Iran broke off diplomatic relations. *N. Y. Times*, Feb. 6, 1942, p. 4.
- 5 GERMANY—NORWAY—SWEDEN. Germany notified Sweden there was no longer a need for Swedish watch on Norwegian interests and property in Sweden since Sweden had recognized the Quisling government in Norway. *B. I. N.*, Feb. 21, 1942, p. 156.
- 6 ARGENTINA—BOLIVIA. Signed agreement in Buenos Aires concerning highway construction. *P. A. U.*, June, 1942, p. 355.
- 10 BELGIAN MARITIME COURTS. Inaugurating ceremonies occurred at Middlesex Guildhall, Westminster. *London Times*, Feb. 11, 1942, p. 2.
- 17 CHINA—IRAN. Announcement made of arrangements for exchange of Ministers. *N. Y. Times*, Feb. 18, 1942, p. 6.
- 18 COLOMBIA—AXIS POWERS (3). President Moringo signed decree authorizing severance of financial and commercial relations. *N. Y. Times*, Feb. 19, 1942, p. 6.
- 19-April 2 WAR GUILT TRIAL. Opened Feb. 19 at Riom, France, with some defendants attacking constitutionality of trial court. *N. Y. Times*, Feb. 20, 1942, p. 1; *London Times*, Feb. 20, 1942, p. 3. The court recessed April 2. *N. Y. Times*, April 5, 1942, IV, p. 4.
- 21 TIMOR. Portuguese National Assembly condemned Japanese invasion of Portuguese Timor. Text of resolution: *N. Y. Times*, Feb. 22, 1942, p. 4. Text of official Japanese statement regarding the attack: *London Times*, Feb. 21, 1942, p. 3.
- 22 ITALY—SAUDI ARABIA. Rome radio announced Italy had broken off diplomatic relations. *B. I. N.*, March 7, 1942, p. 211.
- 23 GREAT BRITAIN—UNITED STATES. Signed agreement providing for post-war economic settlement and lend-lease accounts. Text: *N. Y. Times*, Feb. 25, 1942, p. 12; *Cong. Record* (daily), Feb. 24, 1942, pp. 1584-1585; *D. S. B.*, Feb. 28, 1942, pp. 190-192; *London Times*, Feb. 25, 1942, p. 3; *Cmd.* 6341; *International Conciliation*, May, 1942, pp. 295-299. Summary: *B. I. N.*, March 7, 1942, p. 183.

- 23 LOANS, FOREIGN. President Roosevelt signed bill suspending restriction against loans or credits to belligerent nations by United States citizens during the war. *N. Y. Times*, Feb. 24, 1942, p. 12.
- 26 GREAT BRITAIN—VENEZUELA. Great Britain ceded claim to the Island of Patos to Venezuela. The dispute dates back to 1799. *N. Y. Times*, Feb. 27, 1942, p. 8; *London Times*, Feb. 28, 1942, p. 3; *B. I. N.*, March 7, 1942, p. 207.
- 26-27 ECUADOR—PERU. Peru and Ecuador ratified the Protocol signed at Rio de Janeiro, Jan. 29, 1942, settling border dispute. *N. Y. Times*, Feb. 27 and 28, 1942, pp. 3 and 6; *D. S. B.*, Feb. 28, 1942, p. 194. Text of protocol: *D. S. B.*, Feb. 28, 1942, pp. 195-196.
- 26/March 9 CANADA—UNITED STATES. Exchanged notes at Ottawa relating to the application and interpretation of the Rush-Bagot agreement concerning naval forces on the Great Lakes (April 28-29, 1817). Texts: *Canada Treaty Series*, 1942, No. 3.
- 27 ECUADOR—UNITED STATES. Signed an exchange stabilization agreement at Washington involving a \$5,000,000 loan. *N. Y. Times*, Feb. 28, 1942, p. 3.
- 27 FRANCE (Vichy)—UNITED STATES. United States announced that the Vichy Government had given assurances that no military aid will be given to the Axis Powers, except as required by the armistice terms. *N. Y. Times*, Feb. 28, 1942, p. 1. Text of United States statement: *D. S. B.*, Feb. 28, 1942, p. 189.
- 27 MEXICO—UNITED STATES. President Roosevelt signed Executive Order authorizing establishment of a commission to be known as the Joint Mexican-United States Defense Commission. *D. S. B.*, Feb. 28, 1942, p. 193.

March, 1942

- 2 FRANCE (Free)—UNITED STATES. United States recognized Free French control of certain island possessions in the Pacific. Text of statement: *N. Y. Times*, March 3, 1942, p. 7. The Vichy Government made representations against the recognition. *B. I. N.*, March 21, 1942, p. 246. Text of statement by American Vice Consul at Nouméa: *D. S. B.*, March 7, 1942, p. 208.
- 3 BRAZIL—UNITED STATES. Signed three agreements at Washington concerning (1) lend-lease arrangements, (2) development of rubber resources in Amazon basin, (3) finances. *N. Y. Times*, March 4, 1942, p. 8. Text of notes exchanged: *D. S. B.*, March 7, 1942, pp. 206-207.
- 4 AUSTRALIA—THE NETHERLANDS (in exile). First Australian Legation attached to the Netherlands Government. *B. I. N.*, Mar. 21, 1942, p. 240.
- 4 CANADA—UNITED STATES. Signed convention and protocol at Washington for avoidance of double taxation. *N. Y. Times*, March 5, 1942, p. 16; *D. S. B.*, March 7, 1942, p. 225. Text: *Cong. Record* (daily), March 10, 1942, pp. 2222-2225. Discussion of terms: *N. Y. Times*, March 22, 1942, III, pp. 1-2.
- 6/12/April 12 CANADA—UNITED STATES. Exchange of notes regarding coordination and integration of unemployment insurance laws of the United States and Canada. The agreement entered into force April 12. *D. S. B.*, Apr. 25, 1942, p. 376. Text: *Canada Treaty Series*, 1942, No. 4.
- 9 GREAT BRITAIN—GREECE (in exile). Signed agreement in London, pledging co-operation for the war, liberation of Greece, reestablishment of Greek freedom and independence, etc. *N. Y. Times*, March 10, 1942, p. 4; *London Times*, March 10, 1942, p. 3; *B. I. N.*, March 21, 1942, pp. 251-252.

- 9 GREAT BRITAIN—UNITED STATES. Announced appointments to an Anglo-American Caribbean Commission to study social and economic problems in their West Indian islands. *N. Y. Times*, March 10, 1942, p. 8; *D. S. B.*, March 14, 1942, pp. 229-230.
- 10 CROATIA—RUMANIA—SLOVAKIA. Effected *de facto* military alliance at Bucharest, aimed at preventing further Hungarian expansion and recovering areas seized by Hungary. *N. Y. Times*, April 6, 1942, p. 5.
- 11 GREEK MARITIME COURTS. Opened at the Middlesex Guildhall. *London Times*, March 12, 1942, p. 8.
- 11 PERU—UNITED STATES. Signed lease-lend agreement at Washington. *N. Y. Times*, March 12, 1942, p. 12. Also agreement by which a second U. S. Army officer will go to Peru as adviser. *D. S. B.*, Mar. 14, 1942, p. 234. Text: *Ex. Agr. Ser.*, No. 240.
- 12 BRAZIL—AXIS POWERS (3). Axis assets up to 30% confiscated to guarantee compensation for Brazilian ships sunk. *N. Y. Times*, March 13, 1942, p. 1.
- 12/26 JAPAN—VATICAN. United States State Department announced representations to the Vatican against the proposed establishment of diplomatic relations with Japan. *B. I. N.*, March 21, 1942, p. 265. The *Osservatore Romano*, Vatican City newspaper, published Japanese statement of March 26 regarding resumption of negotiations for the establishment of diplomatic relations. Text of statement: *N. Y. Times*, March 31, 1942, p. 9; *London Times*, March 28, 1942, p. 4.
- 13 PRIZES OF WAR. Announcement of appointment of three commissioners, to consider cases involving enemy ships brought into the Federal Eastern District of New York. *N. Y. Times*, March 13, 1942, p. 8.
- 14 ARGENTINA—SPAIN. Signed (barter trade) agreement in Madrid. *N. Y. Times*, March 15, 1942, p. 26; *B. I. N.*, March 21, 1942, p. 263.
- 17/18 CANADA—UNITED STATES. Exchanged notes in regard to construction of a military highway to Alaska. *N. Y. Times*, March 19, 1942, p. 13. Texts: *D. S. B.*, March 21, 1942, pp. 237-239.
- 18 GERMANY—TURKEY. Berlin announced signature of agreement for delivery of Turkish fish to Germany. *N. Y. Times*, March 19, 1942, p. 4.
- 18 UNITED STATES—VENEZUELA. Signed a lend-lease agreement at Washington. *N. Y. Times*, March 19, 1942, p. 10.
- 18/20 CANADA—UNITED STATES. Exchanged notes providing for transfer to armed forces of United States of certain citizens and former citizens now serving in Canadian naval, military or air forces. Texts: *D. S. B.*, March 21, 1942, pp. 244-246; *Canada Treaty Ser.* 1942, No. 5.
- 19 GUATEMALA—UNITED STATES. Guatemala announced that the United States had set up an air base in Guatemala for protection of the Panama Canal. *N. Y. Times*, Mar. 20, 1942, p. 6.
- 19/31 CHINA—IRAQ. Signed treaty of friendship at Baghdad. *D. S. B.*, March 21, 1942, p. 249. Announced March 31 that diplomatic missions would be exchanged. *B. I. N.*, Apr. 18, 1942, p. 346.
- 20 JAPAN—SOVIET RUSSIA. Signed protocol at Moscow, extending for one year the fisheries agreement which expired Dec. 31, 1941. *N. Y. Times*, March 21, 1942, p. 1; *B. I. N.*, Apr. 4, 1942, p. 316.
- 20 VENEZUELA—AXIS POWERS. President of Venezuela ordered Axis vessels interned. *N. Y. Times*, March 21, 1942, p. 3.

- 21 CHINA—UNITED STATES. Signed financial agreement at Washington, giving effect to \$500,000,000 loan voted by Congress. *N. Y. Times*, March 22, 1942, p. 34. Text: *D. S. B.*, March 28, 1942, pp. 264-265.
- 22 ECUADOR—AXIS POWERS. Presidential decree banned transfer of any Ecuadorean ship registry to an Axis national or a national of any country occupied or controlled by the Axis. *N. Y. Times*, March 23, 1942, p. 2.
- 24 INDIA—UNITED STATES. Henry F. Grady named Chairman of Advisory Mission to India, with Louis Johnson acting as personal representative of President Roosevelt. *N. Y. Times*, March 25, 1942, p. 3; *D. S. B.*, March 28, 1942, p. 260.
- 25 SAUDI ARABIA—UNITED STATES. Upon invitation of Saudi Arabia, the United States organized a mission to study the water and agricultural resources of Arabia. Personnel: *D. S. B.*, March 28, 1942, p. 261; *N. Y. Times*, March 26, 1942, p. 6.
- 26 CZECHOSLOVAKIA (in exile)—MEXICO. Resumed diplomatic relations. *N. Y. Times*, March 27, 1942, p. 3; *Central European Observer* (London) Apr. 17, 1942, p. 131.
- 26 FRANCE (Vichy)—UNITED STATES. The United States accepted French assurances that the French fleet would not be handed over to Germany. *N. Y. Times*, March 27, 1942, p. 7.
- 26 INTER-AMERICAN INDIAN INSTITUTE. Announcement made at Mexico City of formation of the Institute, with John D. Collier as president. *N. Y. Times*, March 27, 1942, p. 4.
- 29 GREAT BRITAIN—INDIA—UNITED STATES. Great Britain gave notice of accession of India, effective from March 9, 1942, to extradition treaty between the United States and Great Britain, signed Dec. 22, 1931. *D. S. B.*, Apr. 11, 1942, p. 330.
- 29-April 10 GREAT BRITAIN—INDIA. Sir Stafford Cripps, British envoy, offered post-war dominion status to India, in return for current coöperation. *N. Y. Times*, March 30, 1942, p. 1. Text of Draft Declaration of Discussion with Indian Leaders: *London Times*, March 30, 1942, p. 4; *B. I. N.*, Apr. 4, 1942, pp. 283-284. Text of Cripps broadcast to Indian people: *N. Y. Times*, March 31, 1942, p. 15. On April 10 the All-India Congress Party decided the Cripps plan was unacceptable. *N. Y. Times*, Apr. 11, 1942, pp. 1, 5. Texts of Indian replies, Cripps press statement and broadcast to the people: *N. Y. Times*, Apr. 12, 1942, pp. 40-41; *London Times*, Apr. 13, 1942, pp. 3, 5. Summary of the discussions at New Delhi: *B. I. N.*, Apr. 18, 1942, pp. 319-328.
- 30 BULGARIA—TURKEY. Announced that a trade agreement had recently been signed. *B. I. N.*, April 18, 1942, p. 345.
- 30-April 1 PACIFIC WAR COUNCIL. Council was created at Washington by representatives of the United States, Great Britain, China, Australia, New Zealand, Canada and The Netherlands. *N. Y. Times*, March 31, 1942, p. 1. At its first meeting on April 1 the Council mapped military, supply and political plans. *N. Y. Times*, April 2, 1942, pp. 1, 3.
- 30-April 6/8 CANADA—UNITED STATES. Exchanged notes at Washington regarding the application to Canadian nationals residing in the United States of the U. S. Selective Training and Service Act of 1940, as amended. *D. S. B.*, Apr. 11, 1942, pp. 315-318.
- 30-April 15 INTER-AMERICAN DEFENSE BOARD. A permanent staff of high military officials appointed to plan mutual defense, control and protection of Inter-American shipping. First meeting held March 30 in Washington. *N. Y. Times*, March 31,

1942, p. 3. The first meeting of the Emergency Committee opened at Montevideo April 15. *B. I. N.*, May 2, 1942, p. 405.

- 31 CHINA—TURKEY. Announced signature of a treaty of friendship. *B. I. N.*, Apr. 18, 1942, p. 346.
- 31 POISON GAS. Chinese communiqué charged Japanese use of poison gas. *N. Y. Times*, March 31, 1942, p. 8.

April, 1942

- 1 GREAT BRITAIN—UNITED STATES. Navicerts to be eliminated due to simplification of procedural methods in economic warfare. *N. Y. Times*, Feb. 14, 1942, p. 7; *D. S. B.*, Feb. 14, 1942, p. 153.
- 2 MEXICO—UNITED STATES. Exchanged ratifications at Washington of claims convention, signed Nov. 19, 1941. Mexico made its first payment [\$3,000,000] under the terms of the convention. *D. S. B.*, April 4, 1942, p. 274; *D. S. B.*, Apr. 11, 1942, p. 330. Text: *U. S. T. S.*, No. 980.
- 4 FRANCE (Free)—UNITED STATES. Free French control of the Cameroons and French Equatorial Africa recognized by the United States. A United States Consulate General will be established at Brazzaville. *N. Y. Times*, April 5, 1942, pp. 1, 12; *D. S. B.*, April 4, 1942, p. 273. The Vichy Government protested against the appointment. *N. Y. Times*, April 8 and 9, 1942, pp. 10 and 3.
- 4 PRISONERS OF WAR. Exchange of British and Italian prisoners took place at Smyrna, Turkey. *N. Y. Times*, Apr. 5, 1942, p. 5.
- 6 HAITI—UNITED STATES. Initialed memorandum at Washington announcing agreements for strengthening and implementing resolutions adopted at the Foreign Ministers' meeting at Rio de Janeiro, and for making more effective the Declaration of the United Nations and the Lend-Lease agreement between Haiti and the United States, signed Sept. 16, 1941. *N. Y. Times*, Apr. 14, 1942, p. 12. Text of memorandum: *D. S. B.*, Apr. 18, 1942, pp. 353-355.
- 7 BOLIVIA—UNITED STATES. Bolivian Foreign Office announced agreement whereby the United States would undertake to buy the entire Bolivian copper output. *N. Y. Times*, April 8, 1942, p. 3.
- 7 MEXICO—UNITED STATES. Issued joint statement on total collaboration in the war effort. Text: *N. Y. Times*, April 8, 1942, p. 19; *D. S. B.*, April 11, 1942, pp. 325-326.
- 8 NICARAGUA—UNITED STATES. Exchanged notes at Washington providing for United States cooperation in the construction of the Inter-American highway in Nicaragua. *D. S. B.*, Apr. 25, 1942, pp. 368-369.
- 9/15 EMERGENCY ADVISORY COMMITTEE FOR POLITICAL DEFENSE. Pan American Union Governing Board announced an invitation to the United States to designate one of the seven members of the committee, to be constituted pursuant to the 3d Meeting of Foreign Ministers. The first meeting to open at Montevideo on April 15. *N. Y. Times*, April 15, 1942, p. 4; *D. S. B.*, Apr. 11, 1942, p. 322.
- 13/14 FRANCE (Vichy)—UNITED STATES. United States note informed the Vichy government of its intention to "enter into relations with those French citizens who are in actual control" of French territories. Text: *N. Y. Times*, Apr. 14, 1942, pp. 1, 11; *D. S. B.*, Apr. 18, 1942, pp. 335-336. The French Government's statement of April 14 rejected the United States note. Text: *N. Y. Times*, Apr. 15, 1942, p. 2.

- 14 IRAN—JAPAN. Diplomatic relations severed by Iran. *N. Y. Times*, April 15, 1942, p. 8; *B. I. N.*, May 2, 1942, p. 400.
- 16 BANKS. The Inter-American Financial and Economic Advisory Committee approved a resolution on the convening of a conference of representatives of central banks of the American Republics. *D. S. B.*, May 2, 1942, p. 383.
- 16 CANADA—UNITED STATES. *Federal Register*, pp. 2849–2852, contained regulations adopted by the International Fisheries Commission, pursuant to the Convention for the Preservation of the Halibut Fishery, signed Jan. 29, 1937. *D. S. B.*, Apr. 18, 1942, p. 358.
- 16 PERU—AXIS POWERS. All commercial and economic relations banned by Peruvian President. *B. I. N.*, May 2, 1942, p. 403.
- 17 ARGENTINA—UNITED STATES. Concluded agreement, providing for reciprocal waiver of fee for passport visas. *D. S. B.*, May 16, 1942, p. 441.
- 17 FRANCE (Vichy)—NICARAGUA. Nicaragua announced their commercial treaty would be canceled. *N. Y. Times*, Apr. 3, 1942, p. 9.
- 17 MEXICAN OIL. American and Mexican experts signed agreement fixing \$23,995,991 as the value of American-owned oil properties, expropriated by Mexico on March 18, 1938. *N. Y. Times*, Apr. 19, 1942, p. 1. Text of agreement: *D. S. B.*, Apr. 18, 1942, pp. 351–352.
- 18 DIPLOMATIC RELATIONS. United States Department of State issued a compilation showing severances of diplomatic relations. *D. S. B.*, Apr. 18, 1942, pp. 338–350.
- 20–24 INTERNATIONAL LABOR ORGANIZATION. The Emergency Committee opened its meeting in London. *London Times*, Apr. 21, 1942, p. 2. Meetings closed April 24. *B. I. N.*, May 2, 1942, p. 397.
- 21 BULGARIA—JAPAN. Signed trade agreement at Sofia. *N. Y. Times*, April 22, 1942, p. 6.
- 21 PATENTS. President Roosevelt ordered the Alien Property Custodian to seize all patents controlled or owned by nations at war with the United States. *N. Y. Times*, Apr. 22, 1942, p. 1.
- 22 ARGENTINA—UNITED STATES. Announced establishment at Buenos Aires, in accordance with Art. 12 of the trade agreement which became provisionally effective Nov. 15, 1941, of a mixed commission to study the operation of the agreement and to make recommendations relating thereto, etc. *D. S. B.*, April 25, 1942, p. 373.
- 23 FRANCE (Vichy)—SOUTH AFRICA. Diplomatic relations were broken off by the Union of South Africa. *N. Y. Times*, Apr. 24, 1942, p. 8; *London Times*, Apr. 24, 1942, p. 4.
- 23–24 PERU—UNITED STATES. Agreement by exchange of notes at Washington, by which Peru undertakes mobilization of its national resources to produce war materials for the United States. *N. Y. Times*, Apr. 24, 1942, p. 11. Texts: *D. S. B.*, Apr. 25, 1942, pp. 366–368. Announced April 24 conclusion of an agreement by which the United States will purchase yearly 200,000 bales of Peruvian cotton during the war. *N. Y. Times*, Apr. 25, 1942, p. 11.
- 24 GREAT BRITAIN—SWEDEN. Sweden protested to Great Britain against alleged surreptitious arming by British officials in Sweden of Norwegian merchantmen which attempted to run the German blockade of the Skagerrak from Gothenburg on April 1. *London Times*, Apr. 25, 1942, p. 3.

- 25 CHINA—EGYPT. Announced agreement for exchange of Ministers. *N. Y. Times*, Apr. 26, 1942, p. 11.
- 27 SLOVAKIAN RECOGNITION. Granted by France (Vichy). *N. Y. Times*, Apr. 28, 1942, p. 3.
- 27 SOVIET RUSSIA. Broadcast a note sent to the Powers, charging the German Government with "a premeditated policy" of atrocities in Russia. *B. I. N.*, May 2, 1942, p. 410.
- 29 CANADA—UNITED STATES. Signed extradition treaty at Washington. *D. S. B.*, May 2, 1942, p. 387. Text: *Cong. Record* (daily), May 11, 1942, pp. 4194-4195.
- 29 CUBA—FRANCE (Free). Cuba granted *de facto* recognition of Free French control over five French territories. *N. Y. Times*, Apr. 30, 1942, p. 5.

May, 1942

- 2 IRAN—UNITED STATES. President Roosevelt announced lend-lease aid would be extended to Iran. *N. Y. Times*, May 3, 1942, p. 1; *D. S. B.*, May 2, 1942, p. 383.
- 2 IRAQ—UNITED STATES. President Roosevelt announced lend-lease aid would be extended to Iraq. *N. Y. Times*, May 3, 1942, p. 1; *D. S. B.*, May 2, 1942, p. 383.
- 2-9 PAN AMERICAN CHILD CONGRESS. 8th Congress met at Washington. United States personnel: *D. S. B.*, May 2, 1942, p. 386. Text of President Roosevelt's message: *D. S. B.*, May 9, 1942, p. 405. Text of Final Act: *P. A. U. Congress and Conference Series*, No. 37.
- 4 IRAQ—UNITED STATES. First Minister from Iraq presented his credentials to President Roosevelt. *N. Y. Times*, May 5, 1942, p. 6; *D. S. B.*, May 9, 1942, p. 403.
- 4-13 MADAGASCAR. British armed forces occupied the island May 4. United States Department of State announced its approval and promised United States assistance if necessary. Text of announcement: *N. Y. Times*, May 5, 1942, pp. 1, 8; *D. S. B.*, May 9, 1942, p. 391; *London Times*, May 6, 1942, p. 4. United States note was rejected May 5 by the Vichy government. *N. Y. Times*, May 6, 1942, p. 1. British Foreign Office announced May 13 that the Free French National Committee would assist in the administration of the islands. *N. Y. Times*, May 14, 1942, p. 6.
- 7 BRAZIL—UNITED STATES. Signed naval mission agreement at Rio de Janeiro, replacing the agreement signed May 27, 1936. *D. S. B.*, May 24, 1942, p. 481.
- 7 NETHERLANDS (in exile)—UNITED STATES. Dutch Legation at Washington raised to rank of an embassy. *D. S. B.*, May 9, 1942, p. 402; *N. Y. Times*, May 8, 1942, p. 4.
- 7 PERU—UNITED STATES. Signed reciprocal trade agreement at Washington. *N. Y. Times*, May 8, 1942, p. 10. Analysis of agreement: *D. S. B.*, May 9, 1942, pp. 410-422.
- 9-14 MARTINIQUE. United States note to Admiral Robert, French High Commissioner in the West Indies, outlined conditions whereby the French possessions would remain under French control. Text of Vichy version: *N. Y. Times*, May 17, 1942, p. 16. Text of Vichy version of the reply [of May 13]: *N. Y. Times*, May 17, 1942, p. 16. Announcement was made May 14 that immobilization of French warships had commenced. *N. Y. Times*, May 15, 1942, p. 1.
- 11 PERU—UNITED STATES. President Prado addressed the United States Congress. *Cong. Record* (daily), May 11, 1942, pp. 4175-4176, 4208-4209.

- 12 NORWAY (in exile)—UNITED STATES. Diplomatic representatives raised to rank of ambassador. *N. Y. Times*, May 13, 1942, p. 10; *D. S. B.*, May 16, 1942, p. 438.
- 13 POPE PIUS XII. Appealed for peace in radio address. Excerpts: *N. Y. Times*, May 14, 1942, p. 6.
- 14 MEXICO—AXIS POWERS (3). Following the sinking of a Mexican ship, Mexico sent a note to all three Axis powers demanding guarantee of reparation by May 28. *N. Y. Times*, May 15, 1942, p. 5.
- 14 PHILIPPINE ISLANDS (in exile). President Quezon established headquarters in Washington. *N. Y. Times*, May 15, 1942, p. 5.
- 15 BULGARIA—ITALY. Signed agreement at Sofia for shipment of foodstuffs to Italy. *N. Y. Times*, May 16, 1942, p. 6.
- 15 JAPAN—SOVIET RUSSIA. Ratified agreement, signed Oct. 15, 1941 at Harbin, ending border dispute between Manchukuo and Outer Mongolia. *N. Y. Times*, May 16, 1942, p. 8.
- 15 PRIZES OF WAR. Reported that German surface raiders took prizes to French ports although the prize courts remained in the Reich. *N. Y. Times*, May 16, 1942, p. 4.
- 16 FRENCH INDO-CHINA—JAPAN. Announced a working agreement for 1942 on economic relations. *N. Y. Times*, May 17, 1942, p. 21.

INTERNATIONAL CONVENTIONS

EUROPEAN COLONIES AND POSSESSIONS IN THE WESTERN HEMISPHERE. Havana, July 30, 1940.

Ratifications deposited:

Chile. April 28, 1942. *D. S. B.*, May 16, 1942, p. 441.

Mexico. March 21, 1942. *D. S. B.*, April 4, 1942, p. 309.

Nicaragua. May 12, 1942. *D. S. B.*, May 23, 1942, p. 481.

Uruguay. March 26, 1942. *D. S. B.*, April 4, 1942, p. 309.

INTER-AMERICAN INDIAN INSTITUTE. Mexico City, Nov. 29, 1940.

Ratification deposited: Nicaragua. March 10, 1942. *D. S. B.*, March 28, 1942, p. 267.

INTER-AMERICAN RADIO COMMUNICATIONS ARRANGEMENT. Revision. Santiago, Chile, Jan. 26, 1940.

Text: *Ex. Agr. Ser.*, No. 231.

Entered into force: July 1, 1940.

POWERS OF ATTORNEY. Protocol. Washington, Feb. 17, 1940.

Ratification deposited: United States. April 16, 1942. *D. S. B.*, May 9, 1942, p. 422.

Text: *Cong. Record* (daily), March 24, 1942, pp. 2951-2952.

PRISONERS OF WAR. Geneva, July 27, 1929.

Adhesion: El Salvador. March 5, 1942. *D. S. B.*, March 14, 1942, pp. 233-234.

RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Revision. Cairo, April 8, 1938.

Application to: French Colonies (by Vichy Government). [Oct. 1941] *D. S. B.*, April 11, 1942, p. 330.

RED CROSS. Geneva, July 27, 1929.

Adhesion: El Salvador. March 5, 1942. *D. S. B.*, March 14, 1942, pp. 233-234.

SANITARY CONVENTION. Paris, June 21, 1926.

Ratification deposited: Turkey (with reservation). Jan. 6, 1942. *D. S. B.*, March 28, 1942, p. 265.

TELECOMMUNICATIONS CONVENTION. Madrid, Dec. 9, 1932.

Application to: French Colonies (by Vichy Government). [Oct. 1941] *D. S. B.*, April 11, 1942, p. 330.

WILDLIFE PRESERVATION IN THE WESTERN HEMISPHERE. Washington, Oct. 12, 1940.

Promulgation: United States. April 30, 1942. *D. S. B.*, May 2, 1942, p. 387.

Ratification: Peru. Dec. 31, 1941. *D. S. B.*, March 21, 1942, p. 248.

Ratifications deposited:

Dominican Republic. March 3, 1942. *D. S. B.*, March 21, 1942, p. 248.

Mexico. March 27, 1942. *D. S. B.*, April 11, 1942, pp. 330-331.

Came into force: April 30, 1942.

DOROTHY R. DART

SUPREME COURT OF THE UNITED STATES

EX PARTE DON ASCANIO COLONNA¹

ON MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF PROHIBITION AND
MANDAMUS

Original. *Decided January 5, 1942*

In view of § 7 (b) of the Trading with the Enemy Act and of the state of war existing between this country and Italy, an application to this court by the Italian Ambassador, praying for process looking to the release of a vessel and cargo owned by Italy from a libel proceeding in a District Court, will not be entertained.

Motion for leave to file denied.

Per CURIAM:

Petitioner, the Royal Italian Ambassador, seeks leave to file in this court a petition for writs of prohibition and mandamus, directed to the United States District Court for the District of New Jersey. The basis of this application is petitioner's allegation that a vessel and its cargo of oil, the subject of litigation in the District Court and now in its possession, are the property of the Italian Government and are entitled to the benefit of Italy's sovereign immunity from suit.

After the motion was filed, there occurred on December 11, 1941, the declaration that the United States is at war with Italy. Section 2 (b) of the Trading with the Enemy Act, 40 Stat. 411, defines "enemy" to include the government of any nation with which the United States is at war. Section 7 (b) contains the following provision, 40 Stat. at 417:

Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patent, trademark and copyright suits] . . . And *provided further*, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

This provision was inserted in the Act in the light of the principle, recognized by Congress and by this court, that war suspends the right of enemy plaintiffs to prosecute actions in our courts. See S. Repts. Nos. 111 and 113, pp. 21, 24, 65th Cong., 1st Sess.; *Caperton v. Bowyer*, 14 Wall. 216, 236; *Hanger v. Abbott*, 6 Wall. 532, 536-37, 539; *Masterson v. Howard*, 18 Wall. 99, 105; *Porter v. Freudenberg*, [1915] 1 K. B. 857, 866-80. In view of the statute and the opinions in the cases cited, the application will not be entertained. Cf. *Rothbarth v. Herzfeld*, 179 App. Div. 865, 867-69, 167 N. Y. S. 199, affirmed 223 N. Y. 578, 119 N. E. 1075.

Motion for leave to file denied.

Mr. Justice Roberts took no part in the decision of this application.

¹ 314 U. S. (Preliminary Print), p. 510.

EIRE HIGH COURT

(Before Hanna, J.)

ZARINE *v.* OWNERS, etc. S.S. RAMAVAMcEVoy & ORS. *v.* OWNERS, etc. S.S. OTTOMcEVoy and VELDI *v.* OWNERS, etc. S.S. PIRET and S.S. MALLECKERT & Co. *v.* OWNERS, etc. S.S. EVEROJAApril 29, 30, and May 1 and 16, 1941¹

The Government of Eire having stated their opinion that the States of Latvia and Estonia were not under the sovereign independent authority of the Union of Soviet Socialist Republics, the court must treat as nullities the various transactions and documents alleged to have culminated in the alleged sovereignty and purporting to pass the property in the ships.

Inasmuch as the sovereignty of the U.S.S.R. over Latvia and Estonia had not been established, the vessels were not the property of the U.S.S.R., and the orders given by radio telegram to the various masters must be treated as having been without legal authority and the certificates of delivery given upon such orders of no legal effect.

The vessels had, as a fact, never at any time been in the physical possession of the Latvian and Estonian Governments or of the U.S.S.R., or their agents, and had remained at all relevant times in the possession of the masters on behalf of the respective private owners of the ships.

The immunity for State vessels under public international law does not apply to vessels which are used for private trading purposes, but only to such vessels as are *publicis usus destinata*.

The immunity for State vessels other than those *publicis usus destinata* has been granted only when the vessels are either owned or in the physical possession of the sovereign claiming the immunity.

The various motions of the U.S.S.R. dismissed with costs.

HANNA, J., said that in the consideration of the questions which arose in this case there had to be considered, first, the movements of the ships prior to their arrival in the ports of Eire; secondly, the political developments in Estonia and Latvia in relation to the Union of Soviet Socialist Republics, and, thirdly, the actions of the masters of the various ships after arrival in the ports of Eire.

The S.S. *Otto* belonged to a number of citizens of Estonia as part owners and was registered at the Port of Taillin, Estonia. According to the official list of Estonian ships, issued on the 7th February, 1940, by the Marine Department of the Estonian Ministry of Commerce, she had sailed under the national flag of the Estonian Republic. She had been a privately-owned merchant vessel engaged in commerce. On the 29th June, 1940, she had left Milford Haven under a trip charter party for Swansea, arriving there on the

¹ LXXV Irish Law Times Reports, 153. Reported by Kenneth Deale, Barrister-at-Law.

(REPORTER'S NOTE.—An appeal, taken by the Union of Soviet Socialist Republics, to the Supreme Court (Sullivan, C. J., Murnaghan, Meredith, Geoghegan and O'Byrne, JJ.) was, on July 3rd, 1941, unanimously dismissed with costs. The Chief Justice intimated that a reply had been received to a question directed to the Minister for External Affairs stating that the Government did not recognize the Union of Soviet Socialist Republics as a sovereign independent State either *de facto* or *de jure* in Latvia or Estonia).

same day. She had left Swansea on the 2nd July, 1940, for St. John's, New Brunswick, where she had arrived on the 20th July. She had left St. John's some time later with a cargo of timber and had arrived in the port of Cork on the 14th August, 1940, where she now lay. The other two Estonian ships were the S.S. *Piret* and the S.S. *Mall*. They belonged to the Taillin Shipping Company of Estonia and had sailed under the Estonian flag, appearing in the official list of the Estonian ships, issued on the 7th February, 1940. She was registered in the port of Taillin. The S.S. *Piret* on the 17th July, 1940, had left Porto Padre, Cuba, on a trip charter party to Eire with a cargo of sugar. She had bunkered at Norfolk, U.S.A., and arrived in Dublin on the 12th August, where she was now. She was a privately-owned vessel engaged in commerce. The S.S. *Mall* left St. John's, New Brunswick, on the 24th July, 1940, with a cargo of timber for Waterford, where she had arrived on the 7th August, having called at no other port.

The Steamship *Ramava* and the Steamship *Everoja* were Latvian ships and appeared in the official list of the Latvian ships issued on the 4th January, 1940, by the Marine Department of the Latvian Ministry of Commerce, and the owners were Latvian citizens, the *Ramava* being owned by Karklius & Company, and the *Everoja* by F. Grauds. They were both registered as of the port of Riga and, like the other ships, were privately-owned vessels engaged in commerce. The *Ramava* had left Paris Boro on the 27th July, 1940, via Halifax, proceeding on a trip charter party to Eire with a cargo of timber, arriving in the port of Dublin on the 10th August, 1940. The position of the *Everoja* was slightly different. The agents for that ship in America were Thor Eckert of New York, and on the 15th June, 1940, the owner, F. Grauds, had entered into an agreement with Thor Eckert & Co., giving the latter complete control and operation of the said *Everoja* for three months with an option of a further three months. On June 29th, 1940, the *Everoja* had left Santiago, Cuba, on a trip charter party with sugar for Dublin, where she had arrived on the 26th July, 1940, having called only at Norfolk, U.S.A., and Halifax for bunkering. In the meantime, on the 8th July, 1940, the owners had entered into a time charter of the ship to Thor Eckert, which charter was still in force and under which, at the termination of the voyage to Eire, the vessel was to return to the control of Thor Eckert & Company, who had supplied the bunkering and outgoings since her arrival in Dublin.

While those Estonian and Latvian ships were at sea, as above set out, events had been happening in the Baltic States which required consideration. On the 16th June the U.S.S.R. with military force had occupied Estonia and Latvia, with the following results, alleged by the plaintiffs to have been brought about by military operations.

His Lordship said that he would deal with Estonia first. On July 22nd, 1940, the Duma of Estonia had passed the following declaration asking for admission to the U.S.S.R.:

Basing ourselves on people the State Duma U.S.S.R. to admit the U.S.S.R. on the same as the Russian Soviet and Estonia! Long live the

On the 23rd July, 1940, the nationalization of all private port. On the 27th July a Estonia restricting the use of to heavy penalties. The telegram sent to Mr. Raymond Burt as follows:

Concerning ships require take all steps available 1940, regarding restrictions namely:

Article (1), All Estonian leaving port or entering port;

Article (2), Captains regarded traitors, who are made responsible;

Article (3), Ships are without permission of being supplemented by

"any captain leaving permission of Estonia for life. This decree

This telegram had informed being let on lease to *Sovfracht* proceed to U.S.S.R. ports;

On the 28th July, 1940, the the shipping enterprises with the shipping agent in Estonia telegram on the 1st August, in Government.

Following those declarations U.S.S.R. had incorporated the following decree:

Having heard the decision Estonian Duma, the State the request of the Estonian Socialist Republic in Socialist Republic with

JUDICIAL DECISIONS

as claimed by the defendants, the U.S.S.R., that by reason of these acts all Estonian ships had become the nationalized property of the U.S.S.R. On the other hand, the plaintiffs claimed that all the said laws and decrees were illegal and *ultra vires* the powers of the Estonian Government according to the Constitution. (See affidavit of M. Sarvamaa, a witness to the events in Latvia after the military occupation of that State had taken place, as to those in Estonia. On the 21st July, 1940, the Latvian Parliament passed a declaration for admission to the U.S.S.R. in terms similar to those passed in Estonia. On the 27th July a radio telegram had been sent from the Ministry of Marine in Riga to the masters of the various ships, similar to that sent to Mr. Burke. On the 5th August, the Soviet Government of the U.S.S.R. had admitted Latvia into the U.S.S.R. by a decree, couched in the usual phraseology, and, in consequence of those acts, as claimed by the U.S.S.R. that all the Latvian ships had passed into the hands of the U.S.S.R. ship.

Therefore, the position claimed by the U.S.S.R. purported to be (but the court had not to decide the disputed constitutional question) that both of Latvia and Estonia had been in fact incorporated into the U.S.S.R. and that all nationalized property of the Latvian and Estonian States had become the nationalized property of the U.S.S.R. as the present sovereign of those States. As had been already indicated, the validity of those acts was disputed as unconstitutional and illegal. I will refer later to the view of the Government of Eire—a view which was submitted to the court.

Lordship then returned to the position of the ships and the attitude of the various parties with reference to them. The four vessels, during these political movements, had been on their way to ports in Eire. They operated their nationalized mercantile marine not through the U.S.S.R. Government, but through the Russian company known as the *Sovfracht*, Moscow, London through the Anglo-Soviet Shipping Company whose agents were Messrs. Palgrave Murphy and Company. After the various ships concerned in Eire, the several masters, on dates from the 20th August, each had signed a document entitled "Certificate of Delivery" to Palgrave Murphy and local agents in Cork and Waterford for the *Sovfracht*, Moscow, who had purported to take each ship on charter, under time charter. Some of those documents were incomplete and as no physical possession of the vessels had at any time been given to Palgrave Murphy or *Sovfracht*, or to a master and crew, as claimed by the U.S.S.R., and as it was suggested that the captains were not fully aware of the legal position and had signed those documents under the influence of the threats contained in the radio telegram setting out the position referred to, his Lordship regarded them under the circumstances as a move which was supposed to strengthen the position of the U.S.S.R. in Moscow, in a situation in which it had been anticipated that

might be some difficulty in their while lying in a neutral port and agents. In view of the subsequent certificates of delivery could be physical control or possession which who held the ships on behalf of the to execute any time-charters or to after the happening of those events U.S.S.R. had claimed the right to and Estonia and hoist the Russian subsequently, those actions were contrary for the private owners. The particulars follow:

A.—Record No. 1941, 48 P: The Charles Zarine, the accredited representative of Latvia, and by his claim he sought interested in the Steamship *Ramava* port of Dublin a declaration that Consul-General by the Government laws of that Republic he was the ship and he claimed also an injunction the Latvian flag and changing the

B.—Record No. 1941, 50 P: The who was the accredited representative being Vice-Consul in Eire of the sought against the owners and all of the port of Parnes, Estonia, at relief to that sought in the case of

C.—Record No. 1941, 51 P: The and John Veldi; the said John Mc Eire of the Government of Eston Republic, and he sought against the Steamship *Piret* of Taillin, Eston and also against the owners and *Mall* of Taillin, Estonia, and now save as regards the second named *Ramava* above mentioned; and the as part owner of the Steamship *M* tive of the Taillin Shipping Company said two above-mentioned ships.

D.—Record Nos. 1940, 511 P solidated by the order of the High November, 1940. The plaintiffs in pany (Incorporated) of New York owners and all persons interested

in Latvia, and now lying in the port of Dublin, damages for breach of contract and for moneys payable by the defendants to the plaintiffs and a declaration that the plaintiffs were entitled to the sole control of the ship. This ship had been arrested on the 7th August, 1940, and was in custody in Dublin.

At the first instance an appearance had been entered in the *Everoja* action by the Anglo-Soviet Shipping Company of London, on behalf of F. Gratwick, the owner, but subsequently their counsel in court had stated that they had withdrawn from the case.

Following on that withdrawal, application had been made on behalf of the U.S.S.R. for liberty to enter an appearance (in these words) "in order that the question as to the property in the *Ramava* may be decided by the Court" and to consolidate the action with the consolidated actions of the *Everoja*. That application had been granted. The U.S.S.R. had thereupon entered unconditional appearances, but subsequently on application to the court the appearances had been amended by adding the words "with due regard to their rights." Subsequent to that amendment of appearances the U.S.S.R. on the 21st February, 1941, had applied to the court by way of motion now under consideration to have the several plenary sittings and proceedings in the said actions set aside on the ground that the Latvian and Estonian ships referred to in the said notice were the property of the U.S.S.R., which was a recognized foreign independent sovereign State.

The submissions on behalf of the U.S.S.R. were:

- 1) That the claim to the ships was made by an independent sovereign State and that the court could not deal with the matter save with the consent of that sovereign State.
- 2) That the immunity existed for all ships in the ownership of the sovereign State, whether used for public purposes or for commerce.
- 3) That the immunity applied to ships in which the sovereign State had an interest, whether in the ownership or possession of the sovereign State or not.

The submissions on behalf of the plaintiff were:

- 1) That the Union of Soviet Socialist Republics was not a sovereign independent government as regards Estonia and Latvia and that the property of the ships had not passed to the U.S.S.R.
- 2) That the U.S.S.R. at no time had actual possession of those ships which was a necessary condition.
- 3) That the ships were not used for public purposes, but were ordinary trading vessels arriving with cargoes to neutral ports.
- 4) That there had been a submission by the U.S.S.R. to the jurisdiction of the court.
- 5) That the decrees relied upon by the U.S.S.R. had no extraterritorial effect.

It was admitted that the U.S.S.R. was an independent sovereign State.

tions;" or (as had been stated in another case) "almost un-
cepted by the community of nations." On that principle they h
e various propositions.

There was no difficulty as to warships, as all nations had agreed t
aes they were to be free from arrest, detention or foreign jurisdic
ilar principle had been applied to what were called public s
ample, hospital ships, supply ships, and such like. In the consid
e cases on that subject it would be found, in his Lordship's opin
ere immunity had been granted the vessel in question had be
the actual physical possession of the State that was implead
ion or the ownership was admitted. In some cases where i
ght be claimed, it seemed to be the opinion of some of the judge
e immunity was granted the title of the sovereign must have be
ned (see *Vavasseur v. Krupp*, 9 Ch. D. 351, and *Haile Selassie v*
ireless Ltd., [1938] Ch. 839).

The leading case on general immunity, was *The Exchange*, 7 Cr
which Marshall, Chief Justice of the Supreme Court of the Unite
ve a judgment that was referred to frequently. He said:

The vessel owned by citizens of Maryland was in 1810 capt
French warship, armed, and taken into French service. The
was made under one of the decrees of Napoleon during the war
Great Britain and France. The following year the *Exchange*, c
into a French national war craft under the name of the *Balaon*
by a French crew and commanded by a French captain, put
port of Philadelphia for repairs of injuries sustained in stress of
The former owners arrested the ship, alleging that the cap
illegal and demanding their property.

arshall, C.J., held that the question of the title to a ship having th
of a man-of-war was not justiciable in the courts of another coun
nfined his decision to ships of war, as it was an armed vessel o
htfully in the port of Philadelphia and while there under the prot
e American Government.

But the more modern cases must be analyzed. In *The Parlem*
pra), Esher, L.J., at page 203, had based his opinion on the fact
p in question had been in the possession, control and employ of
the Belgians and that it had been a public vessel carrying tl
nant and officered by men of the Royal Belgian Navy, commiss
e King of the Belgians. That was obviously a public vessel own
ite. The next case had been *The Broadmayne*, [1916] P. 64. Th
p requisitioned by the British Government and carrying oil for t
had been in a collision—in respect of which salvage had been
ainst the Crown. It had been in the possession of the Crown, hav
quisitioned; and, as Swinfen Eady, L.J., said at page 69: "A ship
quisitioned by the Crown is as free from arrest as a King's ship-

The only Irish case which had been made against time been under the or Ministry of Marine having had been manned with been in the possession [1919] P. 95, the ship having been pany; against the Estonian war by the Estonian Government, with a captive in London, where a case of actual ownership P. 30, she had been said German-owned ship named ship of the Portuguese had been requisitioned ordinary trading voyage when she was arrested. present, it having been possession of the Port [1924] P. 236, the vessel had been in Petrograd and had traded from Marseilles crew paid by the owners the trade organization of tion for the vessel. The whilst in Dartmouth and case, at the time the question the possession of the agreement said: "I am not dependent the Government of the as, for instance, if the *J* remark bore on the question might not be sufficient

In the case of *Compania A. C. 485*, the ship had entered in Bilbao and at that time been at sea a decree having all vessels registered in possession of the ship and defendants, the Spanish that being so, it had been

aded in a British court. The last case in point of date was *T. Mendi*, [1939] A. C. 256. The ship had been registered at Bilbao in 1937 requisitioned by the Government of the Republic of Spain at sea. When she had arrived in the Thames the owners had her *in rem*. In 1938 she had been requisitioned by the National Government of Spain and held for the National Government by the masters as their agents. The Republican Government had issued a writ against the ship a defendant and arrested her. The National Government intervened under protest and it was held that as the National Government was a foreign sovereign State it could not be impleaded. In *The Mendi* had been in the possession of a sovereign State. The case *see v. Cable & Wireless Ltd.*, [1938] Ch. 839, was not a shipping claim in respect of monies due by the defendants under a contract with reference to the radio telegraph station at Addis Ababa. It had been pleaded that the cause of action was vested in the King by reason of his conquest of the Empire of Ethiopia. Bennett, J., in the proceedings should be stayed as the claim to the monies had been made by the King of Italy. That decision was reversed on appeal and Sir S. Macnaghten, M.R., in giving the judgment of the court, stated the principle as follows:

Where it is either admitted or proved that the property to which a claim is made either belongs to or is in the possession of a foreign sovereign or his agent, the principle will apply, but where the claim is not proved or admitted to belong to or to be in the possession of a foreign sovereign or his agent, is in the possession of a third person and the plaintiff claims it from that third person and the issue for the court is whether or not the property belongs to the plaintiff or to a foreign sovereign, the very question to be decided is one which cannot be answered in favor of the sovereign's title before it can be said that the title is being questioned.

In *The Cristina* cited with approval the views of Lord Atkin and Lord Wright as to the distinction to be drawn between "a claim brought by a foreign State" (Lord Atkin's phrase) or "bare assertion" (Lord Wright's phrase) and the proprietary title or possession, proved or admitted. In 1938 he said that the court respectfully agreed with the view of Lord Wright in the *Cristina*, where he said:

There is, I think, neither principle nor authority binding the court to support the view that a mere claim by a Government would be sufficient to bar the jurisdiction of the court, except in such cases as where a war or other notoriously public vessels or other public property are claimed as belonging to the State.

In these cases satisfied him (Hanna, J.) that in public international law ownership or possession must be established as a basis for a claim to title claimed.

The second question was whether it was a universal rule or usage of international law to extend the privilege of immunity to ships owned by a State when engaged in ordinary trade. To establish such an international law would require almost universal acceptance. In his Lordship's decision in *The Parlement Belge* (5 P. D. 197) could not be taken as a decision upon that point. Although the vessel had carried passengers and some freight, her main employment had been the carriage of Belgian mails and she had undoubtedly been owned by the King of the Belgians. Her protest to the jurisdiction had been taken by Her Majesty's Attorney General. When the case was heard before Sir Robert Phillimore (14 P. D. 129) he held that "a packet conveying mails and carrying passengers does not, notwithstanding that she belongs to the Sovereign of a State and is officered by officers commissioned by him, come within the category of vessels which are exempt from process of law."

He had followed his own decision in *The Charkieh*, L. R. 4 Ad. 40. His decision in *The Parlement Belge* was reversed by the Court of Appeal on the ground that, by reason of the carriage of mails and belonging to the sovereign of a foreign State and in the hands of his officers, it was destined to public use. It was not a decision in favor of ordinary vessels owned by a State. He (Hanna, J.) regarded the principles in *The Charkieh* case as fundamental and could not find that they had been expressly overruled. She had been a vessel belonging to the Khedive sent with a cargo to Great Britain, when a collision took place with the *Thames*. In the head note it was stated:

If a sovereign assumes the character of a trader and sends a vessel belonging to him to this country to trade here, he must be considered to have waived any privilege which might otherwise attach to the property of a Sovereign.

At page 99 Sir Robert Phillimore said: "Assuming again that the vessel has the status which entitles him to the privilege claimed, has he conducted himself as a trader, or has he waived that privilege?"

In the case of *The Swift* (1 Dods. 320), Lord Stowell had to decide whether the King was bound by the Navigation Acts and, after stating the difficulties attending the solution of the question, he said:

The utmost that I can venture to admit is that if the King of some sovereigns do, he might fall within the operation of the Acts. Some sovereigns have the monopoly of certain commodities, and they traffic on the ordinary principles that other traders traffic on. The King of England so possessed or exercised any monopoly, I am prepared to say that he must not conform his traffic to the general principles by which all trade is regulated.

After pointing out that in the opinion of Lord Stowell any privilege had been waived and after stating that the vessel was em-

the ordinary purposes of trading and was one of a commercial fleet, Sir Robert Phillimore proceeded:

No principle of international law and no decided case and no *dictum* of jurists of which I am aware has gone as far as to authorize a sovereign prince to assume the character of a trader when it is for his benefit and when he incurs the obligation of a private subject to throw off his disguise and appear as a sovereign to the injury of the private person.

In the argument in that case Clarkson, K.C., cited Twiss on *The Law of Nations* (Volume 1, Section 205) as an authority for the proposition that if a sovereign elected to come to this country as a trader or to send a vessel to trade here, he could not claim the privileges and immunities which the comity of nations would otherwise have accorded to him in his character as sovereign.

His Lordship now turned to the writings on public international law of distinguished jurists with reference to the development of a restrictive opinion upon the question of immunity of those trading ships. In the *Journal of Comparative Legislation*, Vol. 6, at page 272, C. R. Dunlop, K.C., wrote as follows:

The question of the immunity of ships owned by a State from the jurisdiction or liabilities to which private owned ships are subject and whether such immunity ought to be abolished or modified has become one of great importance. Before the Great War, state-owned ships were mostly confined to warships and ships employed solely in the public service of the State; but during and since the war States, recognizing the national service which ships other than ships of war render or are capable of rendering in time of war or peace, have come to own and employ ships for a greater variety of public purposes and also for ordinary commercial purposes. During the war the British Government acquired by building or purchase a large fleet of merchant ships and so did the Government of the United States, acting through and in the name of the United States Shipping Board. Other States also became owners of merchant ships ceded to allied Governments by Germany under the provisions of the Treaty of Versailles. The Government of the Union of Socialist Republics in Russia maintains its claim to be owners of the ships of the Russian commercial fleet nationalized by a decree dated January 26th, 1918.

Mr. Dunlop, after critical examination of some of the topics, ended as follows, at page 277:

It is a possible view that the English courts have carried the doctrine of international comity too far and ought not to have extended it to cases of ships employed in commercial work. In 1873, Sir Robert Phillimore expressed the opinion that a sovereign may, by assuming the character of a trader waive in respect of such trading the privilege which he enjoys generally as a sovereign and there is high authority in the American courts to the same effect.

In the *Law Quarterly Review*, Volume 42, at pages 25 and 308, the question he (Hanna, J.) was considering had been dealt with by M. Louis Franc, the

President of the International Maritime Committee. He dealt, at page 33, with the history of the development of public international law and the subject of the immunity of private ships owned by the State, as follows:

One of the legacies of the Great War has been the enormous development of the State-owned commercial marine. The United States, Australia, Canada and several continental nations had been building or buying ships during the strenuous times of submarine warfare. When peace came, these ships were brought into the ordinary trade and in the legal field they have given rise to a good deal of controversy and litigation. The International Maritime Committee was requested from all sides to have the matter considered from the broader point of view of commerce and equity. This was done. At the Conference of London, 1922, it was unanimously agreed that if government or corporation formed by them chose to navigate and trade as ship owners they ought to do it under the common law and submit to the same legal remedies and actions as any other shipowner. The Conference of Gothenburg, 1923, brought the general principles agreed upon in London under the form of an international convention and passed them on the first reading. The Conference in Genoa in 1925 approved of them in the second reading and has accepted amendments which were in accordance with the resolutions passed at the last Imperial Economic Conference. The position at which the draft convention aims is simply that State-owned ships and cargoes will be subject to the common law as to legal actions and remedies. When such ships are employed in ordinary commercial trade, carrying passengers or cargo, they will thus run the risk of arrest in foreign ports and submit to foreign jurisdiction just as any other trading vessel. However, ships of war, State yachts, survey vessels, hospital ships and other vessels owned or operated by the State and employed in other than commercial work and State-owned cargo carried only for the purposes of governmental and non-commercial work, and vessels owned or operated by the State will not be liable to arrest and can only be sued before the courts of the nation whose flag they fly.

At page 308 in his second article, M. Louis Franc described how the draft convention had been provisionally accepted by the following nations: Great Britain, France, Germany, Italy, Japan, Spain, the Netherlands, Sweden, Denmark, Norway, Poland, Estonia, Hungary, Moscow, Rumania, Serbo-Croatia, Slovenia and Belgium. At the diplomatic conference in Brussels in 1926, when the convention had been adopted, the United States had informed them that they had already given effect to the wish for uniformity in the laws relating to State-owned ships, by the Public Vessels Act of 1925; and under the circumstances the United States did not think it necessary to attend the session. The full consideration and discussion of the topic of immunity of ships was set out in this article of the learned President, the only limitation being in reference to the power of any State to suspend the application of the convention in time of war, thus enabling a belligerent State to be protected against the danger of having to give up the immunity with reference to their property.

In Oppenheim's *International Law*, in note 3, at page 670, on this topic the

learned author said: "The convention has been signed by Germany, Italy, Holland, Belgium, Chile, Estonia, Hungary and Poland and is in force in these countries. It has been signed by Great Britain but has not been ratified."

In Hall's *International Law* (1924 edition) the learned author said in the note at page 249:

Article 281 of the Treaty of Versailles and Article 233 of the Treaty of St. Germain-en-Laye provided that if the German and Austrian Governments engaged in international trade, they shall, in respect thereof, have or be deemed to have, no rights, privileges or immunities of sovereignty. On general principles of justice, it would appear that when a State engages in international trade its vessels so employed should be subject to the same treatment as private vessels in foreign ports and there is a growing consensus of opinion in this direction which manifested itself at the London Conference of the International Maritime Committee in October, 1922.

In Cheshire's *Private International Law* (1938, page 95) he says:

Recently it has been widely recognized that ships engaged in commerce ought not to be immune from jurisdiction and by the immunity of States (Ships) Convention concluded in Brussels in 1926 and amended by a Protocol of May 24th, 1934, it was agreed that commercial vessels and cargoes belonging to States should be justiciable to the same extent as if privately owned, and that even non-commercial ships owned by a Government should be subject to the jurisdiction of the national though not of foreign courts.

His Lordship's opinion with reference to the judgments in *The Cristina* was that they fell short of establishing the immunity for State ships engaged in commercial trade. Lord Atkin reserved the point and decided on the ground that *The Cristina* had been in the actual possession of the foreign sovereign (page 492). Lord Thankerton decided on the ground that the ship had been destined to public use for the purpose of the prosecution of the civil war in Spain and, at page 496, had held himself free to consider the decision in *The Porto Alexandre*, pointing out that no inquiry had been made as to whether such exemption had been generally agreed to by the nations and he had said: "It must be common knowledge that they have not so agreed." Lord MacMillan said, at page 498:

I confess I should hesitate to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect.

Lord Wright had taken a somewhat opposite view and said that "as at present advised, I am of opinion that this decision of the United States Supreme Court and of the Court of Appeal correctly states the English law on this point." Lord Maugham, in a strong judgment, had been definitely against the immunity (see page 521).

Having given consideration to the cases and to the opinions of authorities upon public international law, his Lordship (Hanna, J.) came to the decision that there was now no rule or usage of public international law granting immunity from process to State-owned trading vessels.

Finally, on the claim of the U.S.S.R. to immunity, it had been submitted (and his Lordship thought with some force) that as such a claim, where existing in public international law, was based upon the comity of nations, the U.S.S.R. was not entitled to it in any event as that Government did not concede it to other nations (see Lord Maugham's judgment in *The Cristina*, page 523).

Accordingly, the conclusions his Lordship had come to were as follows:

(1) That the Government of Eire, having stated their opinion that the States of Latvia and Estonia were not under the sovereign independent authority of the Union of Soviet Socialist Republics, the court must treat as nullities the various transactions and documents alleged to have culminated in the alleged sovereignty and purporting to pass the property in those ships.

(2) Inasmuch as the sovereignty of the U.S.S.R. over Latvia and Estonia had not been established the vessels were not the property of the U.S.S.R. and the orders given by radio telegram to the various masters must be treated as having been without legal authority and the certificates of delivery given upon such orders of no legal effect.

(3) That as a fact the vessels had never at any time been in the physical possession of the Latvian and Estonian Governments or of the U.S.S.R. or their agents and had remained at all relevant times in the possession of the masters on behalf of the respective private owners of the ships.

(4) That the immunity for State vessels under public international law did not apply to those vessels which were used for private trading purposes but only to such vessels as were *publicis usibus destinata*.

(5) That the immunity for State vessels other than those *publicis usibus destinata* had been granted only when the vessels were either owned or in the physical possession of the sovereign claiming the immunity.

For those reasons his Lordship dismissed the various motions by the U.S.S.R. with costs.

AWARD

ESTATE OF EDWARD N. BREITUNG V. UNITED STATES

In the matter of a claim, predicated upon the alleged illegal detention of the S.S. *Seguranca* by British authorities in 1915, submitted to the Honorable D. Lawrence Groner as Arbitrator under a special agreement between the Department of State and Counsel for the Executor of the estate

*Decision rendered at Washington, D. C., September 27, 1939 * .*

On June 23, 1939 . . . [there was] submitted to me as Arbitrator a claim against the United States on behalf of the Estate of Edward N. Breitung, predicated upon the alleged illegal detention in 1915 of the American S.S. *Seguranca* by British authorities. The submission stipulated that the decision should be rendered on the basis of certain written pleadings and evidence described as follows:

For the Claimant—

Memorial, and evidence listed on sheet attached hereto.†

Reply, and evidence attached thereto.

Additional documents as follows:

Memorandum of June 30, 1933.

Memorandum of January 11, 1934, and evidence attached thereto.

Letter of October 26, 1934.

Memorandum of March 13, 1935.

For the United States—

Answer, and evidence attached thereto.

Reply Brief, and evidence attached thereto.

Memorandum of May 31, 1939.

All of the papers enumerated above were duly delivered to me, and all have been read and have received my careful consideration.

The liability of the United States, if any, grows out of an "Executive Agreement" between the United States and Great Britain for the disposal of certain pecuniary claims resulting from incidents occurring during the World War.¹ Section 2 of Article I provides as follows:

(2) That neither will present any diplomatic claim or request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by the other, any such national to be referred for remedy to the appropriate judicial or administrative tribunal of the Government against which the claim is alleged to lie, and the decision of such tribunal or of the appellate tribunal, if any, to be

* Text of decision furnished by the Department of State.—Ed.

† The list included a number of documents relating to the ship, the log, and some affidavits.

¹ For text, see note in this JOURNAL, Vol. 21 (1927), p. 542.—Ed.

regarded as the final settlement of such claim, it being understood that each Government will use its best endeavors to secure to the nationals of the other the same rights and remedies as may be enjoyed by its own nationals in similar circumstances, and that His Majesty's Government in Great Britain agrees that fullest access to British Prize Courts shall remain open to claimants subject to the right of the British authorities to plead any defences that may be legally open to them.

In Article II there is a recital of the consideration moving the United States to make the arrangement, which reads in part as follows:

The Government of the United States realizes that by the terms of the agreement His Majesty's Government waive their right to receive a net cash payment on account of certain claims recognized by the United States as just and proper, and also their right to press certain other claims, liability for which has not been formally admitted by this Government, but which involve considerable amounts. I desire to record the fact that the Government of the United States will regard the net amount saved to it through the above-mentioned waiver by His Majesty's Government of outstanding claims against the Government of the United States as intended for the satisfaction of those claims of American nationals falling within the scope of paragraph (2) of Article I of the agreement, which the Government of the United States regards as meritorious and in which the claimants have exhausted their legal remedies in British courts, in which no legal remedy is open to them, or in respect of which for other reasons the equitable construction of the present agreement calls for a settlement.

No relief in connection with the detention of the *Seguranca* has been sought in the British courts. Hence, a decision favorable to claimant would depend upon a finding that the claim is meritorious and (1) that no remedy is provided in the British courts, or (2) that "for other reasons" the equitable construction of the agreement imposes on the United States a duty of payment.

The position of the United States in this arbitration is that the claim must be denied because a fair construction of all the evidence compels the conclusion that it is not within any one or more of the conditions on which the United States have undertaken to satisfy claims of American citizens against Great Britain.

The position of the claimant is that the claim is meritorious and that resort to proceedings in British courts would be wholly bootless, would involve large expense, and ought not to be required, and that, upon sound principles of equity and justice it is, in view of the agreement between the United States and Great Britain, the duty and obligation of the United States to make payment.

The United States having declined to recognize the claim, the whole matter has by agreement been submitted to me as Arbitrator.

The *Seguranca* was in the early winter of 1915 an American vessel of approximately 3,000 net tons burden then owned by the New York & Cuba

Mail Steamship Company. Edward N. Breitung was at the time an American citizen residing in the State of Michigan and engaged principally in promoting and developing mining properties in the United States and abroad. He had inherited a considerable fortune and was reputed to be a millionaire. His father had emigrated to the United States from Germany approximately in 1850, had been naturalized, and from 1880 to 1885 was a member of the House of Representatives. In December 1914 Mr. Breitung, without previous experience or connection with the shipping business, purchased from the Hamburg-American Steamship Company the German steamship *Dacia*, which at the beginning of the World War had sought asylum at Port Arthur, Texas. He obtained American registry, and in January-February 1915 sailed the *Dacia* with a cargo of American cotton consigned to a German port. The *Dacia* was captured the latter part of February 1915 by a French warship and condemned as a lawful prize.² Shortly following his purchase of the *Dacia*, Mr. Breitung acquired the *Seguranca*, and on the 23rd of February 1915 contracted with Inter-ocean Transportation Company of America, a war-time corporation, for the transportation of a general cargo by the *Seguranca* from New York to Rotterdam. The charter party was in the form in customary use at the time and contained the usual provision that the vessel should have liberty to comply with the orders of all rulers and governments without liability for breach of charter party. The management of the *Dacia* and of the *Seguranca* was placed by Mr. Breitung in the charge of Hans Otto Schundler and a kinsman, Max Breitung. On March 15th the *Seguranca* cleared from New York for Rotterdam with cargo consisting principally of oil, lard, borax, sausage casings, hides, green apples, and green coffee. The consignors included Morris & Company and Sulzberger and Sons Company, American packing houses, and the consignees were either the consignors or individuals and firms located in Holland. The loading was supervised by inspectors appointed by the British Consul General at New York, and the master of the *Seguranca* was furnished with a copy of his certificate to this effect. On March 31 the *Seguranca* was stopped in the English Channel at some unidentified point off Dover light by a British patrol boat, and her papers were examined by a British naval officer. By his direction the *Seguranca* anchored in the Downs off Deal in British territorial waters, and that day or the next day her master was advised that the ship and cargo would be held for prize court proceedings unless arrangements were made to reconsign the cargo to the Netherlands Oversea Trust or to have it placed in a bonded warehouse in Rotterdam.

² The French Prize Court found that Breitung had obtained the *Dacia* by transfer from E. von Novelty, who had in turn purchased her from the former German owners. Von Novelty had arranged the contract for shipment of the cotton to Bremen. In accordance with French prize law, the *Dacia* was condemned because her transfer to American registry was to evade capture and to continue her in trade with the enemy. Foreign Relations of the U. S., 1915 Supp., p. 508. [See also this JOURNAL, Supplement, Vol. 33 (1939), pp. 686-687.—Ed.]

under the supervision of the British consul at that place. The master of the *Seguranca* communicated with the American Ambassador, who filed a strong protest with the British Government. He also communicated by cable with his owner in New York, and on April 3 was advised that shippers and consignees had consented to reconsignment to the Netherlands Oversea Trust. The delay thereafter and until the 20th was occasioned by the making of arrangements to carry out the reconsignment.

The Netherlands Oversea Trust was created at the instance of Great Britain in the Netherlands in the early stages of the World War to facilitate shipments consigned to neutrals in that country. The delivery of shipments to the trust was not a transfer of ownership, nor did it prevent delivery to the named consignee, but the latter was required to execute a bond or satisfactory security that the shipment would not be reconsigned to Germany.

The *Seguranca* anchored in Rotterdam harbor April 21, docked April 22, and on April 26 had discharged her cargo in accordance with the reconsignment agreement. Shortly thereafter she took aboard a return cargo, and on May 1 was on her way to New York.

The one question on the merits which I deem to be decisive of the case is as follows:

Was there probable cause for the detention of the vessel for the 20-day period?

For if there was no such probable cause, then the rules of international law entitle claimant to relief; and if there was such probable cause, then the rules deny recovery on a claim for damages for detention.

In February 1915 the German Government declared the whole of the waters surrounding England, Scotland, and Ireland to be a military area within which enemy merchant vessels would be subject to destruction after February 18. On March 11, 1915, the British Government by an order in council announced that as a retaliatory measure ships sailing to north German ports or to neutral ports with goods of enemy destination or having aboard enemy property must discharge the goods in a British (or Allied) port, the goods, if not contraband or requisitioned, to be restored on such conditions as were held to be proper by the court. The British Prize Court was given jurisdiction to hear applications by claimants under this order. By proclamation of the same date, the British Government declared that absolute contraband included hides, lubricants, animal oils and fats, etc., for use as lubricants. The cargo of the *Seguranca* consisted of many items within the foregoing. In my opinion, and apparently also in the opinion of counsel for claimant, no question can be raised as to the action of the British patrol boat in stopping the *Seguranca* and making an examination to determine the nature and character of the cargo and whether any part was destined to the German Government. In this view, the question is narrowed to the determination whether the subsequent detention was unreasonable.

An examination of the ship's papers disclosed that the cargo originated in a neutral port and was consigned to a neutral port. If this were all, the detention of the vessel would have been wholly unjustifiable under well recognized principles of international law. On the other hand, the United States having early in the war conceded the right of a belligerent to visit and search, conceded also the right of capture and condemnation, if upon examination a neutral vessel was found to be engaged in carrying contraband intended for the enemy's government or armed forces. They likewise conceded the right to a belligerent to detain and take to its own ports for judicial examination all vessels which it suspected for substantial reasons to be engaged in unneutral or contraband service and to condemn them if the suspicion was sustained.³

In the present case the period of detention was 20 days. On the 6th day the British Government, in reply to a protest by the American Government, informed the latter that the cargo of the *Seguranca*, though consisting mostly of "contraband," might go forward if Great Britain were assured it would not reach enemy hands. So far as I know, goods intended for the enemy and useful in the prosecution of the war, are generally considered to be contraband, and this was the position which the United States took in their protest to Great Britain in the *Wilhelmina* case⁴ and as their own position after entry into the war.

This, then, brings me to the question: Were there reasonable grounds to believe the cargo of the *Seguranca* was intended for transshipment to Germany?

In discussing that question, I do not think it important to distinguish between the grounds existing at the moment of seizure and other and additional grounds developing subsequently. The question should rather be examined in the light of what evidence might have been introduced in a prize court proceeding held after a full investigation and ascertainment of all available facts. This is the English rule, *The Edna*, [1921] 1 A. C. 735, 750, and probably is the American rule. (See *The Olinde Rodrigues*, 174 U. S. 510, 535.) And the rule is of particular application in this case because of the express reservation in the British-American agreement that the United States should in no case be called on to make compensation until after submission to and investigation of the claim in the British Prize Court.

At the time of the detention the *Seguranca* was registered in the name of Mr. Breitung who, as I have said, had not hitherto engaged in the shipping business, and who had some four or five months prior to the time in question purchased a former German ship then in asylum in an American port and, after obtaining her transfer to American registry, publicly declared his purpose to load her with a cargo of cotton and send her to a German port.

³ Telegram of Secretary Bryan to the Ambassador to Great Britain, dated March 30, 1915, Foreign Relations of the United States, 1915 Supp., p. 152.

⁴ Foreign Relations of the United States, 1915 Supp., p. 105.

After her capture and in the subsequent prize court proceedings, there was evidence tending at least to question the *bona fides* of the purchase and transfer. The *Seguranca's* charterer, InterOcean Transportation Company, was organized after the war began by a naturalized American citizen of German origin. That company at or about this time chartered a number of other vessels and shipped cargoes to neutral countries adjacent to Germany. Some were seized and condemned in prize court proceedings as destined to Germany. The two principal shippers of the cargo of the *Seguranca* were American corporations which were considered by the British at that time to be engaged in shipments to the German Government through neutral countries. A number of shipments so made, subsequently were condemned in prize court proceedings.⁵ While the *Seguranca* was on the voyage in question Mr. Breitung sold her to a corporation organized by himself and subsequently transferred the stock which he received in payment, to persons declared after our entry into the war to be enemy aliens, as a result of which the stock was seized by the Alien Property Custodian. The representatives of Mr. Breitung in charge of this maritime adventure were Hans Otto Schundler and a relative, Max Breitung. Schundler was a naturalized American and Max Breitung a German subject. The latter was subsequently involved with the United States authorities in connection with alleged illegal German activities in the United States. And, finally, there was the *Dacia* episode in which Mr. Breitung, Schundler, and young Breitung were the principal actors.

Considered in this aspect, I am perfectly clear that there was at the time of the detention probable cause to warrant suspicion that the cargo of the *Seguranca* was of German ownership and destination. In the United States the accepted definition of probable cause is: circumstances such as will warrant a reasonable ground of suspicion that the vessel is engaged in illegal traffic.⁶ I am constrained to the opinion that the evidence produced by the United States meets this test; and in this view the detention of the vessel seems to me not to have been unreasonable. Upon examination of the vessel's manifest, the British authorities offered the master the alternative of prize proceedings or reconsignment, and the master in turn advised his owner by cable. Breitung promptly agreed to the reconsignment proposition, and the delay thereafter was in obtaining consent of all consignees to this method of handling the difficulty. When the consent was finally obtained, the ship was allowed to proceed. I do not mean to hold or even to suggest that the unwillingness of neutral consignors or consignees of a cargo to consent to a different disposition would excuse detention, but in this case the suggestion of reconsignment was an alternative to prize proceedings, which in the circumstances would have been reasonable, and the release of

⁵ *The Kim*, [1915] P. 215, 3 L.P.C. 167.

⁶ *The Olinda Rodrigues*, *supra*; *The Springbok*, 5 Wall. 1; *The Dashing Wave*, 5 Wall. 170; *The Thompson*, 3 Wall. 155.

the vessel was an act of grace, doubtless, impelled to some extent by the insistence of the American Government. The election of the cargo owners to take advantage of the British proposal and the delay and damage in making it effective are not, in the circumstances, chargeable to Great Britain.

Nor is it chargeable to the United States under their agreement with Great Britain.

In the agreement the United States, in announcing their determination not to request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by Great Britain, specifically provided that such nationals should be referred for remedy to the British Prize Court. Failing this, the United States undertook to satisfy the claim only where upon full consideration the United States were of opinion that it was meritorious and either that there was no remedy in the British courts or that "for other reasons the equitable construction of the present agreement calls for a settlement." Admittedly, claimant has not sought recovery in any British court, and the only explanation is that such proceedings would have been a useless formality. Counsel state in support of this conclusion that decisions of the British Prize Court indicated a settled disposition to deny claims similar to the one in question,⁷ but I think this is not a sufficient excuse. At least one case is cited by counsel for the United States in which, in circumstances in many respects similar, damages for detention were awarded by the Prize Court. In that case the court said:

The damages for detention which were adjudged to him were right-fully given, if the representatives of the Crown had been guilty of undue delay, and this the learned Judge found to have been the case. It is not contested that the foundation of such a claim must be exceptional and unreasonable delay, or that the reasonable decisions which the representatives of the Crown are obliged to take, require, in adequate and ample measure, time and opportunity for inquiry and deliberation, but there was evidence on which the learned Judge could find, as he did, that the delay was nevertheless "undue," and their Lordships were not invited to differ from his decision on a mere question of quantum.⁸

In still another case the British Court said:

If there were no circumstance of suspicion, or, as it is sometimes put, "no probable cause" justifying the seizure, the claimant to whom the goods are released is entitled to both costs and damages. If, on the other hand, there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages.⁹

The present claim comes within the scope of these principles and, if it had merit, would have entitled claimant to a recovery. In any event, both by the terms of the agreement as well as upon equitable considerations the

⁷ *The Stigstad*, [1919] A.C. 279; *The Sigurd*, [1917] P. 250.

⁸ *The Remonstrant*, 6 L.P.C. 329, 341.

⁹ *The Baron Stjernblad*, [1918] A.C. 173, 175.

United States were entitled to have that question submitted upon a full disclosure of the evidence for both sides. For undoubtedly the United States, in stipulating that claims on behalf of American nationals should first be tried out in the courts of Great Britain, had in view the opportunity thus presented of a full and complete factual record, and in reserving the right to award compensation notwithstanding the decision of such courts, the United States undertook no more than to review such record and in their discretion to correct any injustice, if there should be any, to American nationals. If that procedure had been followed in the instant case, many lapses in the present evidence would have been supplied, and much that is now indefinite and uncertain would have been made clear. The proof submitted to me in behalf of the claim consists almost entirely of documentary evidence in relation to the purchase of the *Seguranca*, her charter to the InterOcean Company, the exchange of telegrams between her master and owner after her arrest, her log, and her manifest. And upon this *prima facie* showing of neutral ship and neutral goods, the claimant relies to support the equitable considerations which would warrant payment by the United States. I am of opinion that this is not enough.

The United States have a right under the agreement to demand not only a proper showing of the above facts but also that the *bona fides* of the adventure be proved by clear and convincing evidence. The evidence at hand, as I have indicated, falls short of satisfying this requirement. I am, therefore, of opinion that the claimant has failed to place himself in a position to make claim against the United States, first, because of his refusal to submit his claim to the British courts, which by an order in council were at all times open to him, and, second, because of his failure to produce at this hearing such evidence as upon fair and equitable considerations imposes upon the United States a duty to pay the claim.

D. LAWRENCE GRONER,
Arbitrator

BOOK REVIEWS AND NOTES

Law and Peace in International Relations. By Hans Kelsen. Cambridge: Harvard University Press, 1942. pp. xiv, 181. Index. \$2.00.

The Oliver Wendell Holmes lectures at Harvard University, for 1940-41, make up this book. There were six lectures, under the following titles: The Concept of Law; The Nature of International Law; International Law and the State; The Technique of International Law; Federal State or Confederacy of States; International Administration or International Court. This list of titles gives little indication of the amount of material and subjects covered in the book. It is written in Dr. Kelsen's logical and clear style, and it is very compact—so closely packed in that it is not possible to summarize it in a review.

Coercion, he says, is an essential element of the concept of law; the legal order is a coercive order (p. 20). The peace of law is not an absolute absence of force, but the monopoly of force by the community (p. 12). The solution of the problem of peace can be sought only within the frame of international law (p. 28). He considers at some length the *bellum justum*, and after weighing arguments which lead this reviewer to exactly the opposite conclusion, he concludes that reprisals and war are sanctions, and that international law is a coercive order, and therefore law—albeit a primitive law, "International law can be regarded as true law because it can be regarded as a coercive order which reserves to the international community the use of force—establishes a monopoly of the use of force" (p. 56). This is a little hard to swallow, but it must be swallowed if international law is a coercive order.

We must pass by many interesting and succinctly stated points, recommending them as worthy of reading and study. For example: the State, as a subject of international law, is a being no different from an individual, the subject of national law. "Only individuals can have rights and duties, for the substance of rights and duties can only be the behavior of individuals. . . . Thus international law and national law do not regulate the behavior of different, but of the same, subjects; both regulate the behavior of individuals" (p. 83). It is the element of centralization which gives to national law its superiority as an order promoting peace (p. 123); therefore, a world federal state is desirable, though probably unattainable at present (p. 144). In view of Dr. Kelsen's insistence that law is a coercive order, one is surprised to find him, on the last page, asking for no more than a court with compulsory jurisdiction, and recommending that protection against external aggression be left to political alliances. This does not seem to agree with earlier statements, nor does it explain how the jurisdiction of the court can be made compulsory. Dr. Kelsen is unnecessarily discour-

aged by the failure of the League of Nations. He is right that law, to be efficient, must have force behind it; but political alliances, or the independent judgment of states as to their legal right to make war, do not provide this force.

Whatever Dr. Kelsen writes is of interest to international lawyers, and this little book should be exceptionally useful as a very compact and careful presentation of his views on the matter now uppermost in the minds of international lawyers.

CLYDE EAGLETON

The Panama Canal in Peace and War. By Norman J. Padelford. New York: Macmillan Co., 1942. pp. xvi, 327. Maps, chart, index. \$3.00.

This thorough volume is the result of a careful study of available data on the subject in the United States and the Canal Zone carried on under the auspices of the Bureau of International Research of Harvard University and Radcliffe College. It is the latest work on the subject and is of special interest to students of international relations and law. It is also of interest to the general reader since the Panama Canal is one of the most vital possessions of the United States. The chapters on American rights and powers, operation in time of peace, and during war, and economic significance (Chapters II, III, IV, VI) contain the meat of the book so far as the readers of this JOURNAL are concerned and comprise about three-fifths of the text. The government, administration and business methods are covered in Chapter V.

In Chapter II the author reviews the American rights and powers in the Canal in the light of the pertinent treaties, Acts of Congress, diplomatic correspondence, and decisions of the courts. The tolls controversy, the problem of neutralization, and other questions are examined. The rights and powers of Panama in respect of the Canal are necessarily covered, especially the changes wrought by the 1936 agreements.

The author explains the use of the Canal in time of peace (Chapter III) with particular reference to the rules and regulations relating thereto, including quarantine, customs, cargo, and personal restrictions, as well as the use of radio and aircraft near the Canal. In general, the United States has the exclusive right to regulate and manage the Canal.

In time of war, this peaceful highway between nations is subject to extraordinary precautions with a view to maintaining the safety and neutrality of the Canal, for which the United States is responsible (Chapter IV). The author covers the practice and precedents during the periods of neutrality and belligerency of the United States in the last war and the period of neutrality in the present war. The relation of Panama to the Canal in such times of stress is examined. The use of the Canal and its facilities in connection with the transit of contraband cargoes and belligerent warships have raised the chief problems. There are also questions relating to martial law, flight of aircraft, transit by submarines, application of the Neutral-

ity Act of 1939 and the Lend-Lease Act of 1941, control of aliens, and seizure of foreign vessels in the Zone. The author concludes that "the Canal treaties and agreements have given the United States a durable body of rights adequate for dealing with the problems which have confronted it." In general, the United States has exercised such control as to insure uninterrupted operation of the Canal by vessels of all nations, except enemy craft, under such restrictions as will insure the neutrality and safety of the Canal.

The government of the Canal (Chapter V) rests chiefly on the authority of the President under Acts of Congress. The War Department by direction of the President exercises "all the governmental power" over the Canal and appurtenant territory. The civil administration of the Canal is under the direction of the Governor. The defense of the Canal rests with the Army and Navy. The civil and military establishments function side by side except when in case of national emergency the President orders the Acting General in the Zone to assume full control of the Canal and Zone.

The last chapter deals with the economic significance of the Canal as an inter-ocean waterway. The use of the Canal by world shipping and the trend of cargo movements are shown by numerous statistical tables and graphs. The effect of the Canal on foreign and inter-coastal trade and railroad rates of the United States is discussed.

L. H. WOOLSEY

Sociology of Law. By Georges Gurvitch, with a preface by Roscoe Pound. New York: Philosophical Library and Alliance Book Corporation, 1942. pp. xxii, 309. \$3.75.

It is good for the American bar that, as Professor Pound has suggested in his gracious preface, events have served to bring to the United States a great scholar of Continental Europe, who here on our own soil publishes a book which reveals how that Europe is thinking in a field which borders on the law. Yet it may be a hard task for the American lawyer to understand the thought of this author, and so hard for one who has not already worked in the school of sociological jurisprudence, that he may leave unread Dr. Gurvitch's book despite what Roscoe Pound says about him. Some who might profit most from this penetrating contribution may sadly give up the struggle to read more than the introduction. Abandonment of it will not necessarily betray mental inertia, or provincial aloofness of interest, but rather an habitual lack of thinking in a realm where the customary symbols of thought have wrought a unique nomenclature, and where the author's conception of what might be roughly described as the law differs from the significance commonly attached to that term when employed in our land. If the American reader despairs of finding linguistic clarity in Dr. Gurvitch's pages, it is not due to faulty English on the part of the author, but rather to unfamiliarity with the verbal tokens of ideas through which the latter has made his exposition.

In his introduction the author trenchantly observes that "where an ever-

widening gulf yawns between traditional jural categories and the reality of law, the Sociology of Law becomes a burning actuality."¹ After discussing definitions of the law and seeking one that suits his purpose (pp. 50-60), Dr. Gurvitch gives us his own definition of the Sociology of Law, that shall "describe the precise framework of this new discipline." Accordingly, he declares that "*the Sociology of Law is that part of the sociology of the human spirit which studies the full social reality of law, beginning with its tangible and externally observable expressions, in effective collective behaviors* (crystallized organizations, customary practices and traditions of behavioral innovations) *and in the material basis* (the spacial structure and demographic density of jural institutions)." (p. 61.)

A large part of the book (pp. 68-197) is devoted to a critique of the work of the forerunners and founders of the Sociology of Law. After discussing that of the founders in Europe,—Durkheim, Duguit, Levy, Hauriou, Max Weber and E. Ehrlich, the author makes an interesting survey of the achievements of the American founders—O. W. Holmes, Roscoe Pound, Benjamin Cardozo, and of the "Legal Realism" of K. N. Llewellyn and T. Arnold.

In the final third of the volume the author discusses the Systematic Sociology of Law (Microsociology of Law) and Differential Sociology (in relation both to jural typology of particular groupings, and legal typology of all-inclusive societies), as well as the Genetic Sociology of Law. In his concluding chapter the author states that throughout his introduction and exposition he "has tried to point out the character of the Sociology of Law as a kind of sociology of the human spirit," insisting upon the mutual interdependence between "this part of sociology and philosophy." (p. 304.)

The reader must judge for himself how skilfully the author has revealed the impingement of the Sociology of Law on the same spiritual sphere as that on which the Philosophy of Law realizes itself, and the reciprocal dependence of either upon the other.

CHARLES CHENEY HYDE

America's Strategy in World Politics: The United States and the Balance of Power. By Nicholas John Spykman. New York: Harcourt, Brace & Co., 1942. pp. xvii, 500. Maps, index. \$3.75.

This is essentially a volume of opinion, in the best sense of that word. For it is a reasoned discussion, ably argued from facts available elsewhere. Its novelty consists not in fresh data, but in interpretation and an argument to support that interpretation. Opinion always involves premises; Professor Spykman states his more clearly and asserts their validity more vigorously than is usual. The point of view is summed up in one word, geopolitics. Geopolitics is not a felicitous expression, for it does not state

¹ P. 13, where he adds: "This is the case in our own epoch: for here is a situation in which abstract jural formulas prove themselves to be totally incapable of capturing the turbulent flood of the law's real life, with its novel and unforeseen institutions arising with elementary spontaneity."

the whole case. One of its presuppositions is clear enough—the basic influence of geography, and, one might add, geology. It discounts the fluid forces of history—personalities, legal systems, economic theories, philosophies, moral impulses, religious zeal, cultural eras—in favor of fixed forces. This volume is best informed, more imaginative, and most convincing when using geographical rather than other types of data.

The political half of the word “geopolitics” can be understood only through its provenance. It is politics in the inclusive German sense that embraces sociology, economics, history, and strategy. This dominant quality of politics implies a state which, if not totalitarian, has that tendency. The political philosophy of Professor Spykman’s volume is explicit: it is power politics. Emphasis upon geography need not make power politics the inevitable assumption; such an association is the fruit of the German origins of geopolitics. While there is formal recognition “that power is not the only aspect of international relations” (p. 7), other aspects either do not appear or are candidly (p. 18) and heavily discounted. Legal considerations are conspicuous by their absence. Cultural relations as a basis of political coöperation are sneered at (pp. 246–248), and references to idealism tend to be markedly ironic. The German parentage of the basic ideas appears also in the belief that the democratic “myth” is static or declining and “has lost much of its strength and much of its ability to provide social integration.” There is insensitiveness to democracy’s qualities of tenacity and its power of resurgence in the face of challenge. This doubt of the viability of the democratic thesis encourages emphasis upon the weaknesses and vulnerability of what is admitted to be the strongest and best balanced economy in the world.

Without adequate supporting data or argument, there is an assumption of permanence in the Axis alignment. The German-Japanese “encirclement” rests upon continuity of harmonious policy between those nations, though allies who heretofore have sought to partition the world have never yet achieved stable relationships. Preoccupation with the power aspects of politics leads to over-reliance upon the effectiveness of economic pressure. The argument is largely based upon German successes, though those triumphs were brief and restricted, and merely a prelude to war. So an embargo (*e.g.*, aluminum, p. 299) seems a “simple” process. Accent upon geography and geology also results in underestimation of synthetics and substitutes.

The book is admirably organized; its structure gives strong support to the argument. Its proportions are sound; what might seem over-elaboration of the Latin American section is justified by the total thesis. The style is clear and fresh, occasionally degenerating into flippancy, as in the reference to “Joe” Stalin. The author has a gift of phrase which sums up his ideas provocatively. Premised upon permanent forces like geography and the eternal struggle for power, its outlook upon the future is “realistic”

rather than hopeful. Its prescriptions for action are consistent with that outlook. In short, this is a volume of great competence; opinions regarding it will vary with the readers' own presuppositions. Those who make different value judgments, however, must reckon with it.

HENRY M. WRISTON

Foundations of Modern World Society. By Linden A. Mander. Stanford University: Stanford University Press; London: Humphrey Milford. 1941. pp. xii, 910. Index. \$4.25.

The author, Professor of Political Science at the University of Washington, has, in this work of solid and painstaking scholarship, assembled the evidence which he believes makes it quite clear that nations as isolated units of government are unable any longer to perform their tasks as sovereign independent entities except at ruinous cost. "It should seem obvious that, as life changes and new problems arise, new methods of government must come into existence to meet changed conditions—otherwise disaster ensues" (p. vi). It might have been expected that the author, by reason of his training and his occupation as a teacher of political science, would view the problem "not so much in terms of power politics as in terms of constitution building and of establishing political units more in accordance with the facts of life" (p. ix). He has thus avoided the pitfalls presented by those geopolitical experts who seek to insure against future chaos by restoring a balance of power. It is fortunate that he was not tempted to enter too greatly into investigations purely of government machinery.

It is notable that the author begins his survey with those problems of modern world society which are essentially social, such as health, the international prevention of crime, monetary questions, labor standards, international trade and commerce, the conservation of natural resources, population problems and international economics generally. Even so essentially an internal question as the Silver Purchase Act of 1934 is viewed as an international problem because, under the pressure of mining interests, the advice of expert economists was rejected, with disastrous consequences to China and other countries. "Stabilization involves many nations" (p. 114). All these subjects are treated with pragmatic approach. The problems are defined and the particular action analyzed which was applied under the auspices of the League of Nations, or otherwise.

The second half of the book is devoted to problems of international law and organization. The author believes that a limitation of sovereignty in its accepted sense must come about if human society is to function properly (p. 578). He files a *caveat* of eight points against the present system of international law, but does not attempt to guide its future by any positive suggestion, because this must depend on the outcome of the war. This is disappointing. A work like the present has its justification in preparation for the peace to come. The author points out that with Nazi domination,

law as we now conceive it might disappear; but, in that event, the balance of his discussions would also prove futile.

His survey of collective security, proposals for federation, the limitation of armaments, regional international organization and related subjects are approached partly from the viewpoint of the historian and partly from that of the political analyst. It is curious to find in a work emanating from the Pacific Coast, only a meagre discussion of specific problems of the Far East (pp. 827-843), even though we agree that regional organization in the Pacific must be a subordinate part of a peace-system which embraces the whole world. The author himself points out that the power of an international authority to be established, may well vary according to the needs of each continent (p. 887).

The book will be found invaluable to the many individuals and groups now preparing to make a contribution in the quest for international order. The author never loses sight of his main theme that international society involves every phase of human life. He thus sees life steadily and sees it whole.

ARTHUR K. KUHN

Government and Nationalism in Southeast Asia. By Rupert Emerson, Lennox A. Mills, and Virginia Thompson. (Institute of Pacific Relations Inquiry Series.) New York: International Secretariat, Institute of Pacific Relations, 1942. pp. xiv, 242. Index. \$2.00.

This book, in three parts, was in proof when Japan attacked the United States at Pearl Harbor, and went to war with the British and Netherlands Empires. It was written to furnish a factual and analytical background against which the reader might check his impressions and conclusions anent that part of the Pacific known widely as "the cockpit of Asia," and which has now fallen into the hands of the Japanese. Since the United Nations are pledged to recover the regions now under Japanese military occupation, and since conditions in this area, upon such recovery, can never be the same as in the immediate past, this book will likely serve a greater purpose than was first intended. Had the controlling nations given more attention to the defense of these areas, and to the encouragement and direction of sound and orderly nationalism within them, the story of Southeast Asia might have been different.

The Introduction, by Mr. Emerson, gives an excellent basis for the chapters which follow. It is a reasoned commentary which gives life and blood to the subsequent factual material. Of much significance is Mr. Emerson's statement that the culture and ideology of the Western World has exercised the greatest influence on the nationalism of Southeast Asia.

Professor Mills, in Part II, gives a brief but accurate and readable account of the structure and institutions of government of the political entities of this region, including the Philippines, Burma, British Malaya, Hongkong, The Netherlands Indies, French Indo-China, Taiwan, and

Thailand. Clearly, the study of comparative government in the United States has suffered from its confinement of interest to the leading governments of Europe.

Miss Thompson, in Part III, concludes the book with an analysis of nationalism and the nationalist movements in this area. The separate movements considered are the Philippines, Burma, British Malaya, The Netherlands Indies, French Indo-China, and Thailand. To the reviewer, Miss Thompson has made a notable contribution to the more recent study of "comparative nationalism," which term she uses in her introduction. The facts and conclusions set forth in this section should have been known to the leaders of the Powers ruling over these native peoples, and should have been something of a guide to their policies. Results seem to indicate that such facts, if known, were ignored. The result has been a condition ripe for Japanese conquest, with little or no resistance on the part of the native peoples, save in the Philippines.

The technique of this book, i.e., an analytical introduction, a clinical study of government structure, and an analysis of the political principle which gives such structure its flesh and blood—nationalism—should set something of a standard for future studies in the political and diplomatic fields. Moreover, the practice of collaboration of several, each of whom knows something about one thing, is preferred to the general book by a single author which from its nature must be the assembling of facts from secondary sources, and dealing with subjects with which the author cannot have direct experience or contact.

To those who seek to understand the factors which must prevail in Southeast Asia, should the United Nations win, this book is commended as a necessary reading assignment.

CHARLES E. MARTIN

El Procedimiento Interamericano para Consolidar la Paz. By Hermann Meyer-Lindenberg. Bogotá: Talleres Gráficos Mundo al Día, 1941. pp. 312. Index. \$3.75.

The title of this book might lead the reader to believe that it is a concrete study and analysis of the juridical and political instruments created by the American Republics for the maintenance of peace, with emphasis on the procedural aspects of the question. This volume, however, covers a more extended field, as it is rather a history of the manner in which the methods of pacific settlement of international conflicts have been developed by the states of the new world throughout their continental conferences, from the Congress of Panama in 1826 to the Second Meeting of Consultation at Havana in 1940. The political aspects of the problem of peace are discussed by the author, as well as the purely juridical. This is exemplified by the fact that the question of harmonization of the Colombian and Dominican drafts for the constitution of an American League of Nations is treated in great detail, while a long chapter is devoted to the Lima Con-

ference, which accomplished nothing in the juridical field and whose results were essentially political.

The conclusions of Professor Meyer-Lindenberg are that the Inter-American peace machinery must be simplified and the procedures for pacific settlement amplified and made more effective. He points out, as has already been done by several Latin-American internationalists, the complications brought about in the pre-arbitral stage by the Anti-War Pact of 1933, which established a second and different system of conciliation, after the one created by the Gondra Pact and the Washington Treaty of 1929. And he strongly advocates a more general, obligatory jurisdiction for the institution of arbitration. An Appendix of 95 pages contains the peace instruments, declarations and other acts signed by the American Republics in the different conferences, regular as well as special, in which such matters were discussed from 1889 to 1940.

RICARDO J. ALFARO

South America and Hemisphere Defense. By J. Fred Rippy. Baton Rouge: Louisiana State University Press, 1941. pp. xii, 101. \$1.50.

Among the many books now appearing on South America, this small volume deserves a high place. It is especially useful because it condenses much historical material in a limited space and because it gives clear interpretations of the problems discussed. The book consists of four addresses delivered early in 1941 as the Walter Lynwood Fleming Lectures in Southern History at Louisiana State University.

In the initial lecture, Professor Rippy explains how the American System has evolved and the leading part played by the United States in the process. The Monroe Doctrine has been the keystone of the system, at least until lately, although at times the policies of intervention and non-recognition have weakened its effectiveness. Among the fundamental principles of the American System are: national independence, the pacific settlement of disputes, the faithful performance of treaty obligations, common action against aggression, and collaboration to promote security and the general welfare.

The second lecture directs attention to the resources and politics of South America. To many citizens of the United States, the region south of Panama has long been El Dorado. Enthusiasts like Hinton Rowan Helper and James G. Blaine, and a score of others later, created the tradition of wealth, adventure, and romance that even today colors popular thinking in our country. Professor Rippy submits an objective appraisal. While recognizing the natural wealth of the region, he refuses to overlook its handicaps, such as its tropical climate, lack of coal, and limited population. Additional drawbacks are the relatively low cultural level of the peoples and the common curse of dictatorships.

The following chapter deals with economic relations between the United States and South America. Before the First World War, it is pointed out,

we had little share in the trade of the southern countries. But in 1917, we supplied almost 44 percent of their imports and took 42 percent of their exports. Later we lost much to the Nazis, who resorted to subsidies and barter. Professor Rippy faces squarely the basic problem of uncomplementary economies. He believes that we can exchange foodstuffs for the minerals of Bolivia, Chile, and Venezuela, to the advantage of all concerned. Serious problems arise, however, with respect to our purchase of southern agricultural products, most of which compete with our own. But the question is regarded essentially as one of South American purchasing power, which can be answered to an encouraging extent by increased trade among the southern countries themselves and by a United States program of lower tariffs and loans as represented by the Reciprocal Trade Agreements and the activities of the Export-Import Bank. In this connection, Professor Rippy anticipates an important shift of United States imports from Africa and the Orient to Latin America.

The concluding chapter is entitled "Tierra Dorada" and is devoted primarily to the more recent phase of Yankee enthusiasm for things South American—especially for South American bonds and investments. While the holdings of our citizens in South America amounted in 1914 to only 175 million dollars, by the end of 1930 they had increased to some three billion dollars. Between 1920 and 1930 investment bankers had distributed in this country "South American long term bonds aggregating a face value of at least \$1,000 million. . . . For the investment bankers of the United States, who received fat commissions for the flotation of most of these bonds, South America was a *tierra dorada*—or, more accurately, it was a region cleverly used for the purpose of extracting money from fellow citizens in whose unsophisticated minds the continent to the south was a land of gold." Abundant details are given to back up this conclusion. Professor Rippy argues, with considerable justification, that the present system of governmental loans, through the Export-Import Bank, is preferable.

The title of the book is somewhat misleading, as the author touches sparingly the military, strategic, and psychological problems of hemisphere defense.

S. D. MYRES, JR.

The World's Iron Age. By William H. Chamberlin. New York: Macmillan Co., 1941. pp. xii, 402. Index. \$3.00.

Mr. Chamberlin has written a book that should shatter any complacency that Americans may still cherish with reference to the causes and probable results of the present world struggle. In 1914 the outbreak of the World War proved the beginning of a vicious cycle of war, Punic peace, and more war. There is no doubt in the author's mind that the decline of the West has been a most rapid one during the past 25 years. In Europe, the great political labels that men once lived by, and often died by, are no longer read and observed by men of the present generation. There is a new political

faith based on force and accepted with fear, but it is rapidly spreading, and Mr. Chamberlin fears that American involvement in this second World War will cause multitudes of Americans to become converts to this creed.

The author, writing before the attack upon Pearl Harbor, is a pronounced isolationist. He inclines towards the view that American neutrality can not be preserved by an Administration which he believes is bent upon war. To him the policy of hemisphere defense is entirely valid, and the ideal of "an America concerned with the making of a better democracy within its own frontiers," is one which he regards with favor. American intervention in a second World War he regards with distinct apprehension. War restricts rather than extends freedom for the individual, and with reference to President Roosevelt's four freedoms, he has grave doubts "whether war is a hopeful means either of establishing these freedoms abroad or of maintaining them at home." In time of war, freedom of speech "tends to sink to the level of a dictatorship," while freedom from fear and want are usually menaced by the economic and social dislocations that attend any large-scale human conflict.

Mr. Chamberlin has little doubt that many historians will soon question the wisdom of the foreign policy of the Roosevelt Administration, and we will soon have a "spate of books" with such titles as "The Road to War" and "Now It Can Be Told." To him it is ironic that the charges levelled against certain Americans of being "fifth columnists" were often voiced by refugees who had political axes to grind. He is certain that the techniques employed by propaganda agencies abroad were extensively used in the United States. Interventionists, according to Mr. Chamberlin, had little use for toleration, and the vehemence of their attacks upon the isolationists he regards as strong evidence that the intellectual climate that has recently plagued Europe is now sweeping across the continent of America.

CHARLES CALLAN TANSILL

Ten Years: The World on the Way to War, 1930-1940. By Dwight E. Lee. Boston: Houghton Mifflin Company, 1942. pp. xx, 443. Bibliographical note, index. \$3.75.

The present volume represents an attempt to explain the coming of the present war, minus the presence therein of the United States. It attempts to deal with the crowded decade 1930-1940 in considerable detail (see the ten-page table of contents) but at the same time to give a great deal of interpretation and analysis. The author makes no secret of certain prejudices—the historian's prejudice concerning the importance of history, a prejudice in favor of democracy, a certain degree or brand of internationalism, and (this one not confessed) a certain rosy type of "liberalism" which hardly needs further identification.

The conclusions drawn as a result seem to constitute a great mixture of sound and important items, and not all of them familiar or commonplace by

any means, and what in any publication less dignified than this JOURNAL would probably be called tripe. Of the latter variety are the assertion that "It is true that the German people wanted peace as much as others did" (p. 420) or that the League of Nations (*sic*) "carefully preserved the arrogant sovereignty of its members" (p. 425). Another assertion, to the effect that Hitler might have utilized the forces which he had evoked from the German people "to construct a better world for everybody" seems too bizarre to call for consideration.

It is most regrettable, for entirely different reasons, that such a volume should be published, much more that it should be claimed by its publishers to be one which "would be outstanding in any age." An attempt is made to cover too much ground to permit the author to be entirely accurate; in a certain group of five pages dealing with an incident the details of which are intimately known to the reviewer—and accessible in published materials—are numerous simple errors of fact; it need not be inferred that this is true all through the whole book, of course. Moreover, too much ground is covered to enable the average reader either to plough through its detailed treatment or to grasp and hold it if he does. Finally, there are traces of a too glib and hasty playing with complicated and serious questions and the answers thereto; many of the judgments of the writer seem fresh and very wise, others seem nothing but old "liberal" stereotypes, and it is a profound pity to have so many good things hashed in with so much poor stuff.

The general picture given is that of a treatment where the historian joins the popular lecturer and the journalist is being clever, sophisticated, and amusing for the benefit of the ladies and the young radicals instead of trying to see things as they are and reporting them straight. And this in dealing with a decade when, as the author might agree, the governments of all the major Powers, without exception—Britain, France, Germany, Italy, Japan, and Russia, not to mention the United States—brought their countries into the most dishonorable and perilous situations they had ever occupied, and did so with the overwhelming support of their people. Such an appalling state of affairs calls for more serious and more competent handling than Mr. Lee, with the best will in the world perhaps, has been able to give it.

PITMAN B. POTTER

International Labor Conventions: Their Interpretation and Revision. By Conley Hall Dillon. Chapel Hill: The University of North Carolina Press, 1942. pp. xii, 272. Appendices, bibliography, index. \$3.00.

Since the close of the last war there has been an ever-increasing technical literature in the field of international organization. While most of our scholarly attention has been concentrated on international law, the League of Nations and the Permanent Court of International Justice, the intensive study of the International Labor Organization more quietly has been keeping pace with the rest. For no one who knows the Labor Organization can deny

that its contribution to international procedure has been peculiarly rich. In a specialized but highly controversial field it has succeeded in solving problems which have, in other areas, all but defied adjustment. From this fact arises the importance of a volume such as Professor Dillon has written. While it is a technical work, it is nevertheless a study in real international achievement. It is unfortunate that the probable number of readers the book will have will not measure up to the significance of the international work the volume covers. The study begins with a foreword by John G. Winant, formerly Director of the Labor Office; it states in outline the history of the public international labor movement, and begins almost immediately an examination of the process of making international labor conventions. Following this, the broad problems of collective revision of conventions, the practice of revision, legal questions in the revision of conventions, the interpretation of conventions, interpretation by international bodies, interpretation by national courts, and the effect of the Organization on treaty law and technique are discussed. In retrospect we can see that numerous international labor conventions have been adopted, that certain of these instruments successfully have been revised under a well-organized procedure, and that in a number of ways the principles suitable for the interpretation of conventions have been developed. Professor Dillon is to be congratulated on his splendid contribution to the literature dealing with the International Labor Organization.

FRANCIS G. WILSON

Japan and the Opium Menace. By Frederick T. Merrill. New York: International Secretariat, Institute of Pacific Relations, and Foreign Policy Association, 1942. pp. xvi, 170. Index. \$1.50.

This study, based not only on official documents but also unofficial investigations, provides essential data for understanding the opium problem in the Far East. It makes clear the deteriorating influence of opium smoking on Chinese civilization and the valiant efforts of the Chinese Government in recent years to eliminate opium addiction by rigorous penal laws, by propaganda, and by administrative control of poppy growing and of international trade. These efforts have been in considerable measure frustrated by internal disorders and the financial needs of war lords; by the lack of Chinese jurisdiction in foreign territories, settlements and concessions, and over foreigners under the régime of extraterritoriality; and by Japanese invasion and occupation. To an increasing extent other countries have tried to assist China by accepting international obligations and by coöperating with international administrative organizations. The tremendous profits possible through opium growing and vending, whether furthered by private initiative or by government monopoly, makes the problem inherently difficult. Furthermore, opium can be an instrument of national policy. Japan, while recognizing the evil, preventing the development of illegitimate use in its own territory, and decreasing the amount of addiction

in Korea and Formosa, has tolerated if not encouraged the debauching of the Chinese populations in the areas under its *de facto* control, and has failed adequately to enforce international obligations with respect to opium and narcotic exports to other countries. Some changes were observable in the Japanese attitude under pressure of international discussions at Geneva, but eventually (1939) criticism led Japan to withdraw from the League's Opium Advisory Committee. The book deals with the problem of international control, and discusses the opposing views of those who wish government monopoly as a means to control, and those, especially the United States and China, who believe the problem can only be met by eliminating excess world cultivation of the poppy. It is readable and authoritative. Annexes reprint the important Chinese and Japanese laws on the subject and the texts of certain reports. There is also a bibliography and index.

QUINCY WRIGHT

BRIEFER NOTICES

The Foundations and the Future of International Law. By P. H. Winfield. (Cambridge: University Press; New York: Macmillan Co., 1941. pp. 125. \$1.25.) This is a booklet written for the layman by the professor of English law at Cambridge University in the Current Problems series published by the University Press under the general editorship of Ernest Barker. It is divided into the usual three parts on Peace, War, and Neutrality, with a fourth part dealing with the Future of International Law. The general principles of international law are as a rule well summarized, but the brief treatments of particular topics, such as the Monroe Doctrine, the Kellogg Pact, and Disarmament, miss the most important points. Written during the present war, the violations of international law by the enemy only are emphasized. The author's suggestions concerning the future of international law are conservatively stated and on the whole seem sound.

The Science of Peace. By Philip Marshall Brown. (New York: Fleming H. Revell Co., 1942. pp. 63. 75 cts.) The author has reprinted in an attractive booklet five articles which he contributed to *World Affairs*, the official organ of the American Peace Society of which he is president, and added five more sections to round out his views on the subject, to which he has given a lifetime of thought and many years of practical experience in the foreign service of the United States, as professor of international law and as a writer. He rejects as ignoble the negative spirit of peace in international affairs denoted by the cessation or absence of war, and builds his thesis upon St. Augustine's definition of peace, that is, "the tranquillity of order." This, Dr. Brown argues, "implies the necessity for justice as the basis of order. There can be no tranquillity where there is injustice and disorder. There can be no order unless men are willing to act justly and work for an orderly state of society. Peace cannot be had by earnest desire or by a cowardly evasion of unpleasant obligations. It is not negative in the sense of the absence of disorder. It is something quite different. It cannot be imposed by legislation, by institutions, by political or social systems, by command or by force. Peace is that living state of society which can be created only by men and women of good will and sound character. It does not come from without but from within the hearts of men." (pp. 22-3.) Succeeding

brief sections beginning with peace at home and in the home, follow this concept of peace into industry, in class warfare, in inter-racial relations, in democracy, in education, in religion and in planning for world peace. None of these problems can be solved for others, the author concludes, unless we have solved them for ourselves. The need for a moral and spiritual rearmament transcends all other present needs. We must deserve peace before we can win it.

Dependent Areas in the Post-War World. By Arthur N. Holcombe. (Boston: World Peace Foundation, 1941. pp. 108. 50 cts.) This pamphlet is No. 4 in the series entitled *America Looks Ahead*. So far as this number is concerned, the author has fulfilled the announced purpose of the series, "to provide the American people with expert but condensed comment on some of the more important international issues which they are called upon to face as the result of current wars in Europe and Asia." Excellent summaries are given of the international politics of dependent areas, their government, the struggle for dependencies and the balance of power, and the mandate system, which the author calls "an unfinished experiment", with a final chapter on an American view of the government of dependencies. Professor Holcombe answers in kind some of the arguments, now outmoded by two world wars, in support of the theory advanced by writers of colony-holding nations that colonies do not pay. The book was published three months before the Japanese attack on Pearl Harbor and the subsequent subjugation of Malaya, the Dutch East Indies and the Philippines. The tragic contribution to the success of Japan in these operations of the island bases awarded to her under the mandate system of the Treaty of Versailles will naturally make the realist doubt the wisdom of again placing reliance upon any "system of international government for dependent areas everywhere," as advocated by the author. (p. 94.) Had President Wilson in 1919 claimed for the United States at least some of the Pacific islands "mandated to Japan", the attack on Pearl Harbor probably could not have occurred and the present war in the Pacific would have been greatly modified, if not prevented entirely.

GEORGE A. FINCH

Valutareglering och Clearing. By Raphaël Lemkin. Stockholm: P. A. Norstedt & Söner, 1941. pp. viii, 170. Kr. 6.

La Réglementation des Paiements internationaux. By Raphaël Lemkin. Paris: A. Pedone, 1939. pp. xxiv, 422. Index. The interests of American students of international law have been largely devoted to *public* international law. When they have entered upon a study of private international law it has usually been described as a study of the conflict of laws, which in its turn has been largely confined to an examination of the relationships and effects of the laws of the different States of the American Union upon each other. Occasionally, under the impetus of the Latin American thinking, codes of private international law have been essayed, as was the case of the Bustamante Code; but these have been few and scattered. Here are two excellent treatments, one in Swedish, the other in French, of a complicated subject of private international law. It is a subject in which the Scandinavian jurists have interested themselves and for which they have drawn up codes of uniform practice, some of which have appeared in the pages of *Nordisk Tidskrift för International Ret.* Dr. Lemkin has succeeded in drawing together the complicated threads of international payments, exchange, clearing, and credit into a logical and intelligible system. Unfortunately,

the events of the present war and the few months just prior to its inception have vitiated some of the rules and principles involved. The impact of the barter system and of government finance of international trade has left the nature of this vast subject in a fluid state so that there can be no predicting of its form after the war is over. Were it not for the last reason, either one or both of these excellent works deserve to be translated into English, since nowhere, to the reviewer's knowledge, can similar treatments be found either in legal or financial literature. An English translation would be a valuable addition to American economic and legal thought.

THORSTEN V. KALIJARVI

Far Eastern War: 1937-1941. By Harold S. Quigley. (Boston: World Peace Foundation, 1942. pp. xii, 369. Index.) This volume is primarily devoted to the four years from the outbreak, in 1937, of war on a large scale between China and Japan, to the attack, in December, 1941, by the Japanese upon Pearl Harbor. However, there are several chapters dealing generally with conditions and controversies which lie back of the conflict now being waged. It cannot be said that Professor Quigley has added substantially to the information contained in the considerable number of books dealing with the Far East which other writers have recently published. Nonetheless, the present volume is a convenient one to possess as it is objectively written and presents within a reasonable compass the essential events of the period covered. This value of the book is added to by one hundred pages of appendices giving the texts of important authoritative statements and other official documents. Two maps are included, and there is an excellent index. Perhaps the following statement of the author's estimate of Japan's "New Order" is worth quotation: "It will now be apparent that there is nothing new in the 'New Order' unless it be the extreme callousness of its application. The 'New Order' is the most intensive and all-embracing imperialism, reviving the aims of European imperialism of the eighteenth century and the methods of the Dark Ages."

W. W. WILLOUGHBY

My New Order. By Adolf Hitler. Edited with commentary by Raoul de Roussy de Sales. (New York: Reynal & Hitchcock, 1941. pp. xvi, 1008. Index. \$1.89.) This book is a collection of Hitler's speeches and is described as a sequel to *Mein Kampf*, but it is much more readable than that mass of confusing incoherencies. It is made interesting by the illuminating commentary of the editor and his judicious selection of such speeches and portions of other speeches as in his judgment "will enable the reader to have a complete picture of Hitler's doctrine and to follow his rise to power and the expansion of his dominion over Europe." This is the editor's purpose as he announces it, and he has done what he meant to do. Of course not all of Hitler's 1,500 speeches are included in this collection. Many of them have been omitted and some of them have been cut, but those that have been selected are given in Hitler's own words so far as those words can be reproduced in understandable English. As the editor explains, Hitler's grammar is incorrect, his sentences often obscure, and "his crudity frequently borders on downright vulgarity." The speeches included begin with the one delivered in Munich, April 12, 1922, and end with the Berlin address to the Reichstag, May 4, 1941. The commentary gives the historical setting of each of the speeches, tracing the orator through his rise to power, his arming of Germany, his scrapping of the treaties, the annexation

of Austria, Munich, the dismemberment of Czechoslovakia, the Danzig crisis, the partition of Poland, the invasion of Scandinavia and the Lowlands, the fall of France, the siege of England, the invasion of the Balkans and the attempt on Russia. Nothing brings out the character and personality of Hitler so well as his own speeches, and the characteristic, revealing utterances are here. The editor undertook a difficult task and has done it well.

H. W. TEMPLE

The International Boundary Commission: United States and Mexico. By Charles A. Timm. (Austin: University of Texas, 1941. pp. 291. Maps, charts, index.) The International Boundary Commission, authorized under the Treaty of March 1, 1889, has as its problem some 2000 miles of a river especially productive of cases of avulsion and accretion. It is not merely a boundary problem; it involves flood control and canalization and water supply and other technical problems. The question of water distribution, upon which the fate of various irrigated areas depends, is one of increasing current importance. The Commission seeks answers by conciliation and technical solution, rather than by formal decision, and Dr. Timm regards it as a unique and successful institution, as indeed it seems to be. He does not attempt an exhaustive study of the work of the Commission, but devotes his attention to legal aspects and procedure, together with historical background and development. It is a solid study, based on original sources, a distinct contribution to those who are interested in finding how nations can get along with each other, and to those interested in the problems raised by a boundary river. It is a publication of the Bureau of Research in the Social Sciences, of the University of Texas.

CLYDE EAGLETON

In the volume edited by Walter H. C. Laves, under the title *Inter-American Solidarity* (Chicago: University of Chicago Press, 1941, pp. xiii, 228. Index. \$1.50), seven papers of substantial merit as to content and form are submitted by the Norman Wait Harris Memorial Foundation. The Seventeenth Institute sponsored at the University of Chicago by the Harris Foundation in July, 1941, dealt with "The Political and Economic Implications of Inter-American Solidarity," and the public lectures are brought together in this compact volume. The contributors include four university professors, a distinguished Mexican financier and public servant, a Colombian educator who has also served his government, and a well known military critic. The longest and most impressive contribution is that of Eduardo Villaseñor, of Mexico, "Inter-American trade and financial problems." He draws upon a wide range of statistical material and authoritative opinion in support of his thesis that the soundest policy which the United States may now follow will be that of large-scale and permanent investment in the Ibero-American countries. Daniel Samper O., of Bogotá, discusses in direct and effective fashion the requisites to any lasting bonds of understanding by the American peoples of each other's respective cultural tendencies. Professor Portell Vilá, of Habana, contends that the solidarity of the peoples of this hemisphere calls for sustained and sincere devotion to the democratic spirit, providing at one and the same time the loftiest inspiration and the most practical discipline. An admirable analysis of the place of the Dominion of Canada in the spiritual, economic and political order of the American peoples is presented by Frank Scott, Professor of Civil Law in McGill University. Professor Upgren, of the University of Minnesota,

courageously faces the chief difficulties in the way of "a close integration" of the production of raw materials in this hemisphere and the industrial system of the United States. Major G. F. Elliot skilfully surveys the military considerations involved in the defense of the hemisphere from attack. The volume closes with a brief chapter by Professor Rippy, well balanced and sagacious, as always, on the real nature of international public relations between the American peoples.

C. E. McGUIRE

Les Problèmes Politiques du Nord Canadien. By Yvon Bériault. (Université d'Ottawa, 1942. pp. 208. Map. \$1.00.) To the best of my knowledge, this is the first Canadian book dealing with the problems of international law raised by the Dominion's claim to the Arctic islands lying between 60 and 141 degrees of longitude. It is a doctoral thesis, and the author has not always used to the best advantage the materials which he has painstakingly collected. Nonetheless, it is a thoroughly useful handbook on the subject. The author tells the story of the exploration of this sector, and reproduces essential parts of the diplomatic exchanges concerning interests of the various states that took part in the discovery of new lands there. To these he adds statements by Canadian legislators and officials, and references to statutes and Orders in Council which extend some measure of Canadian administration to these sparsely inhabited and inaccessible territories. He upholds throughout the case for Canada's sovereignty, chiefly on the basis of an occupation which, in view of the Arctic remoteness of the area and its unfitness for ordinary settlement, is not too inadequate to satisfy the conditions of title. To cover the possibility of new discoveries, he would welcome the general adoption of the sector principle. That, he freely admits, is not yet a rule of law. In building up the case for adequate occupation, the author has not taken from the judgment of the Permanent Court of International Justice in the Greenland case anything like the support he might have found there. In fact, he takes so lightly the court's analysis of the requirements for acquiring title in lands which are *res nullius*, and its qualification of those requirements in polar latitudes, that he finds the sole firm basis of Denmark's claim to Greenland in recognition by the Great Powers. The sector principle is of course absurdly inadequate if only because both in the Arctic and Antarctic there are sectors which have no proximate base but open sea. It would have been interesting to see Mr. Bériault turning his scholarship and good sense to an examination of the possibilities of an international condominium in these northern and southern areas which may in days to come be important paths of the world's commerce.

P. E. CORBETT

Canada in Peace and War. Edited by Chester Martin. (London, Toronto, New York: Oxford University Press, 1941. pp. xx, 244. \$1.75.) The sub-title, *Eight Studies in National Trends since 1914*, aptly describes this little book issued under the auspices of the Canadian Institute of International Affairs. Although uneven in treatment and duplicating material in small part as may be expected with eight authors contributing, this book nevertheless maintains the high standard of scholarship characteristic of publications of the Institute. American readers may find their lack of background in Canadian politics a handicap for the full appreciation of issues discussed, but Canadians will find much to challenge. The subject matter can be gleaned from the following chapter headings: Trends in Canadian Nationhood, Federal Relations in Canada since 1914, Economic

Trends, Population Problems and Policies, Canada and the Last War, Canadian External Relations, Canadian and Imperial War Cabinets, Democracy in the Overseas Dominions. In compact compass a great deal of information is here reviewed and interpreted. If, in planning for the post-war world, we are to avoid the mistakes hitherto made in periods of reconstruction, we would do well to ponder the lessons to be found in studies such as this.

LIONEL H. LAING

The Origin of Manchu Rule in China. By Franz Michael. (Baltimore: Johns Hopkins Press, 1942. pp. x, 127. \$2.00.) This book is an historical study with a full treatment on Manchuria and its people, the Ming Organization in Manchuria, Feudalism, Manchurian Bureaucracy, the Clan elements in the Manchu State, the vestiges of the Mongolian tribes, the Manchu and the Chinese Empire, etc. Since the Christian era, China has faced two major foreign invasions, the first was from Mongolia in 1280 A.D. (Yuan Dynasty); the second was from Manchuria in 1644 (Ching Dynasty); and in both cases the invaders finally became assimilated into the Chinese civilization. Because of the profound and well-integrated cultural background, most of the Chinese social elements—mores, folkways, customs, institutions, etc., remained uncontaminated throughout the period of the invasions. However, the present Japanese invasion, characterized with its brutal techniques and rigid exploitation, seems to allow the Chinese people a lesser degree of high optimism. If Japan turns out to be successful in her present military operation, the political and economic, as well as the social and cultural system of China may become greatly jeopardized. Consequently, the Chinese people are now fighting with all their might with a strong hope to maintain the very existence of their national life regardless of the price in sacrifice. In general, the book is well written from an historical viewpoint, especially for a foreign observer.

CHAN NAY-CHOW

The International Protection of Wild Life. By Sherman Strong Hayden. (New York: Columbia University Press, 1942. pp. 246. Index. \$3.00.) This careful, thorough and easy-reading small book sets forth the background (mainly since 1900), history, purpose and effectiveness of nine now valid and two non-effective treaties concerning the protection of land game, birds, fur seals and whales. Regulatory attempts by a single nation are excluded, as is domestic legislation, excepting so far as it is in support of treaty obligations; and the sea fisheries are left aside, as the subject of exploitation rather than conservation, and also for being under detailed study by others. Dr. Hayden chooses and well maintains an even middle course between ostentatious sentimentality and the powder manufacturers who depend upon a continuing demand for their shells for sport. He appeals rather against needless and short-sighted waste of natural resources and for the encouragement of public enjoyment of nature, and envisions distantly possible world-wide coöperation in furtherance of a gentler belief in the right to life; though admitting that the problem now is one of balancing interests, and that little is really accomplished until the principal economic Powers in any field become convinced that they must support conservation for their own self-preservation. For all the fauna discussed, there is still a dearth of accurate information; and unwillingness to spend time and money on collecting facts or to use and rely on them, once obtained, encourages bitter non-resolvable strife. It is pertinent to note that, although Asia has as yet hardly entered the international conservation picture, the whaling agree-

ments in 1938 were modified expressly to please Japan. Although the Preface is dated 1942 and mentions the probable generally detrimental effect of the war on protective legislation, the text was evidently set up in 1941. There is a magnificent ten-page bibliography of the selected field.

GORDON IRELAND

Air Transportation. By Claude E. Puffer. (Philadelphia: Blakiston Co., 1941. pp. xxiv, 675. Index. \$3.75.) This book is a recent and comprehensive treatment of an industry which has developed a momentum exceeded only by the speed of its physical art. The author states his four-fold purpose: (1) to investigate the economic and legal characteristics of the industry to determine the feasibility of its regulation; (2) to analyze the soundness of federal legislation; (3) to evaluate the efficiency of federal administration; and (4) to suggest improvements in law or administration. He elaborates these purposes through twelve chapters and two appendices, including a selected bibliography of sixty items, 28 of which are United States bulletins and reports. The emphasis rests on regulatory developments. Legal considerations are discussed under three headings: Legal Characteristics of the Air Transportation Industry; The Regulatory Agency; Combinations, Mergers, and Intercorporate Relationships. Under the first heading the author discusses common carrier status, liability for damage to persons and property, rights in airspace, nuisance suits, as well as the division of regulatory control between Federal and State authorities. As the limiting safety factor was increasingly controlled, aviation became an integral part of the national transportation system. Its economic importance turns on the establishment of efficient administrative machinery. The author correctly criticizes the unstable administrative policy switching regulation back and forth between department and agency. With the rapid development of the art, its speed answered insistent transportation demands. Anything aiding the application of this speed factor to transportation is in the public interest. The trend to combination of smaller units is discussed as related to mergers and intercorporate relationships. The author concludes that a mistake was made in failing to empower aviation companies to regulate aviation security issues. Although the book aims to cover air transportation, little discussion is directed to international and local regulatory fields. The book is a valuable contribution.

HOWARD S. LE ROY

INSTITUTE OF PACIFIC RELATIONS. INQUIRY SERIES. New York: International Secretariat, Institute of Pacific Relations, 1942.

Industrialization of the Western Pacific. By Kate L. Mitchell. (pp. xvii, 296. List of tables, index. \$2.50.) Since the Pacific War is an economic as well as military conflagration, this study by Kate Mitchell should serve a dual purpose. It should be within reach of every expert, official or scholar in any way connected with the economic phases of the war and its prosecution. It should also be read by all who seek reliable information about the resources and economic development of the countries and political communities of the Western Pacific. The countries so covered are Japan, Formosa and Korea, Manchukuo, China, French Indo-China, Thailand, British Malaya, Burma, Netherlands Indies, the Philippine Commonwealth, Australia, New Zealand, and India. The effort to reduce economic and industrial problems to national categories is open to obvious difficulty, for such problems, while under national authority, cannot be politically nationalized. However, Miss Mitchell has faced this difficulty, and has overcome it.

Moreover, she has abstained from any single economic pattern for all countries examined. Rather, she has told the story of industrialization of these countries as she found it. Regional and global considerations, while not the theme of the book, are by no means neglected. It may be that Miss Mitchell, by implication at least, emphasizes unduly the part industrialization will play in this region of the world, to the neglect of other factors. It does not seem that the control of the world must always be in the hands of the countries able to manufacture and use the machine-tools of destruction. Lack of space prevents reference to several admirable features of this volume. It is a sound contribution to the contemporary literature of an important region of the world.

The Economic Development of the Netherlands Indies. By Jan O. M. Broek. (pp. xv, 172. Index. \$2.00.) A professor of geography at the University of California contributes this volume to the valuable documentation provided by the Institute of Pacific Relations on problems of the Pacific Area, through its Inquiry Series. Even though Japan is now in military occupation of this region, nevertheless the study of Dr. Broek contains information of the highest value, and has been arranged in logical sequence and order. It is, in short, a study of the economic structure and growth of the Indies. The author gives first something of an historical background, and then adds something on the islands and their people. The substantive portion of the book deals with Indies commodities and the world market; recent changes in economic policy; industrial development; the foreign trade of the Indies; and post-war prospects. In future reconstruction, the United Nations will find much use for this little book. And should Japan's occupation for any reason become permanent, the Japanese would find this study more important as a long-range contribution than any volume on military strategy.

An Economic Survey of the Pacific Area. Part I: Population and Land Utilization. By Karl J. Pelzer. (pp. xviii, 200. List of tables, index. \$2.00.) No one will consciously consult this book for diversion in reading. It is what it pretends to be, a "survey," and a worthy successor to the *Economic Handbook of the Pacific Area*, published in 1934. Handbooks and surveys are generally dull books. They are in a sense the dictionaries of the social sciences. But this is far from a dull book. In its population section, questions of immigration, migration, population distribution, racial composition, natural increase, and other population problems are discussed under national headings. The reviewer finds the section on land utilization less interesting but not less important than the population study. Here the same pattern is followed, covering such subjects as land tenure, community and public lands, agricultural lands, and pastoral and forest resources. With Japan claiming that land and its use is the reason for her present war attitude, this study as to how the countries of the Pacific deal with their respective problems is a contribution of the highest value.

An Economic Survey of the Pacific Area. Part II: Transportation and Foreign Trade. By Katrine R. C. Greene and Joseph D. Phillips. (pp. xvi, 208. List of tables. \$2.00.) This second volume in the *Economic Survey of the Pacific Area* series seeks to do for the foreign trade and transportation of the region what the first volume has done for population and land utilization. As a result, the authors have achieved an excellent technical study, bristling with facts and dates. It appears to be an admirable compendium of information. The section on transportation follows the tiresome pattern of countries, with sub-headings on shipping, railways, highways and motor vehicles,

and airways. The authors could not have found a more unattractive form of organization of their material. The section on foreign trade rescues the volume from complete dullness by an excellent functional discussion of trade controls. However, the close of the section reverts to the hackneyed "trade by countries" approach. Tables appear throughout the book and add to its convenience for those who wish to do their own interpreting of economic data. This is a helpful volume of the reference or "desk copy" type.

CHARLES E. MARTIN

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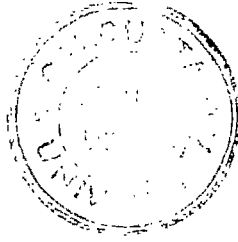
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WILBUR S. FINCH



JURISDICTION OVER FRIENDLY FOREIGN ARMED FORCES

BY ARCHIBALD KING ¹

There are at present armed forces of the United States in England, Northern Ireland, Egypt, Australia, New Zealand, New Guinea, China, India, Iceland, in British possessions in the Western Hemisphere from Newfoundland to British Guiana, and in other friendly countries. There are troops of Great Britain or her dominions in Egypt, Iraq, Iran, and a few of them in the United States. English forces were a few months ago in Greece, and ours in the Dutch East Indies and Burma. There are troops of various exiled governments in England. The armed forces of Germany are in Italy, Libya, Hungary, and Rumania; and those of Japan in French Indo-China and Thailand. In every case mentioned, the visiting forces are in the foreign country by invitation, or at least with the consent, of its sovereign or government.

The situation, it may be admitted, is not new. It has occurred in almost every war in which two nations have been allied. It occurred on a very large scale during the first World War, when there were millions of American and British soldiers in France and a few divisions in Italy, and no doubt a considerable number of German soldiers in Austria and *vice versa*. But never before have there been American forces in so many friendly foreign countries. They are likely to increase both in number of men and number of countries. It therefore becomes pertinent and timely to examine the legal status of such forces with respect to the government and people of the country in which they are; and, in particular, the question whether and to what extent that country may exercise jurisdiction over them.

It is elementary that a civilian national of country A, who enters friendly country B, by the mere fact of doing so subjects himself to the laws of B and to the possibility of civil suit and criminal prosecution in its courts. The same is true of an officer or soldier of A's army who enters B unofficially as a visitor or tourist. Is the same true of Captain M and Private N, of the Army of A, who enter B as a part of an expeditionary force at the invitation of the government of B? To consider and to attempt to answer that question is the object of this article.

The present writer's father, for many years before his death a member of the American Society of International Law and a contributor to this JOUR-

¹ The author expresses his gratitude to Major Charles Fairman, J.A.G.D., U. S. Army (Professor of Political Science, Stanford University), for his valued assistance in assembling some of the material for this article. The author is a colonel, Judge Advocate General's Department, United States Army; but the opinions herein expressed are his own, and not necessarily those of the War Department, The Judge Advocate General, or Major Fairman.

NAL,² used to say that judicial opinions fall into two classes: first, those of Chief Justice Marshall; and second, all others. It is therefore a pleasure to begin with a case in which the opinion is from Marshall's pen. American lawyers are apt to think of him only as the expositor of the Constitution, but to foreigners he is known primarily as America's earliest and one of its greatest authorities on international law.

The case in question is *The Schooner Exchange v. McFaddon*,³ a libel in admiralty in the United States District Court for Pennsylvania against *The Exchange*, in which the libelants, merchants of Baltimore, alleged that that ship had been wrongfully taken from their captain and agent on the high seas by persons acting under orders of Napoleon, Emperor of the French, and was at the date of the libel, August 24, 1811, at Philadelphia; that she had not been condemned by any court of competent jurisdiction; and praying that she be restored to the plaintiffs, her rightful owners. The United States attorney filed a suggestion that the ship libeled was a public vessel of the French Emperor, which, having encountered stress of weather, was obliged to put into Philadelphia for repairs; that, if the ship ever belonged to the libelants, their property had been divested and become vested in the Emperor within a port of his empire according to the laws of France. The United States attorney submitted whether the attachment ought not to be quashed and the libel dismissed.

The case went on appeal to the Supreme Court. The Chief Justice, speaking for the Supreme Court,⁴ referred to the "perfect equality and absolute independence of sovereigns," and the "common interest impelling them to mutual intercourse, and an interchange of good offices with each other," which "have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." Mentioning first the admitted "exemption of the person of the sovereign from arrest or detention within a foreign territory," and secondly "the immunity which all civilized nations allow to foreign ministers," Chief Justice Marshall proceeded:

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose

² George A. King, "French Spoliation Claims," Vol. 6 (1912), pp. 359, 629, 830.

³ 7 Cranch 116.

⁴ P. 137 *et seq.*

safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

The Chief Justice went on to say that a license for foreign troops to enter a friendly foreign country is never presumed but always express, but that the case is different as to ships; and that, unless particular ports be closed to foreign ships of war, and notice thereof be given, "the ports of a friendly nation are considered as open to the public ships of all Powers with whom it is at peace." After mentioning the case of private ships seeking an asylum, but declining to decide what jurisdiction the sovereign of the port might have over them, the Chief Justice continued:⁵

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

The Supreme Court accordingly held that *The Exchange*, as a public armed vessel of a friendly Power, entered Philadelphia upon an implied promise of exemption from the jurisdiction of the local courts, and the court therefore directed the dismissal of the libel and the release of the vessel.

It is true that the case before the Supreme Court concerned a ship, and our present problem relates to personnel of the Army or Navy; but it does not follow that Marshall's statements about troops are mere dicta. Those statements are an indispensable part of the reasoning which led him to his conclusion and can not be rejected without rejecting the conclusion as well. The essence of the decision is not that an armed public vessel, but that any public armed force, whether on land or sea, which enters the territory of another nation with the latter's permission enjoys an extraterritorial status.⁶

⁵ P. 144.

⁶ Chief Justice Marshall's opinion in the case of *The Exchange* has often been praised. In a letter to the late Albert J. Beveridge, Dr. John Bassett Moore—and surely there is no one better qualified to judge in such a matter—said that that opinion is Marshall's greatest in the realm of international law. (Private letter, Moore to Beveridge, cited by Beveridge, *Life of Marshall*, IV, p. 121.) Elsewhere Judge Moore called it the basis of international law on the subject with which it deals. (Moore in Dillon, *John Marshall: Life, Character and Judicial Services*, as portrayed in the Centenary Proceedings throughout the United States on Marshall Day, 1901, I, 521.)

The Supreme Court did not again mention the subject until after the Civil War. In *Coleman v. Tennessee*,⁷ the court said:

It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. . . .

The foregoing is, strictly speaking, a dictum, since the case before the court involved a hostile and not a friendly occupation. Another statement by the Supreme Court to the same effect, which for the same reason is also a dictum, is found in *Dow v. Johnson*.⁸ But even dicta of the Supreme Court are entitled to great weight, especially when they concern a matter which only becomes the subject of actual litigation once in a generation, if so often.

In *Tucker v. Alexandroff*,⁹ the Supreme Court decided, upon the authority of Article IX of the treaty of 1832 between this country and Russia, and Revised Statutes, Section 5280, that the commanding officer of a detachment of the Russian navy, sent to the United States with the consent of the government to man a ship being built for that navy in this country, was entitled to have a deserter arrested and returned to his control. The court discussed the case of *The Exchange* at length, and said of it:¹⁰

This case, however, only holds that the public armed vessels of a foreign nation may, upon principles of comity, enter our harbors with the presumed license of the government, and while there are exempt from the jurisdiction of the local courts; and, by parity of reasoning, that, if foreign troops are permitted to enter, or cross our territory, they are still subject to the control of their officers and exempt from local jurisdiction.

The case amounts to a reaffirmation, at least by way of dictum, of the doctrine laid down in the case of *The Exchange* that the armed forces of one friendly nation within the territory of another by its consent enjoy an extra-territorial status.

In *Chung Chi Cheung v. The King*¹¹ the facts were these: *The Cheung King* was a Chinese maritime customs cruiser, a public armed vessel of China. While that ship was in the territorial waters of the British crown colony of Hong Kong, the appellant, a cabin boy, shot and killed her captain and wounded the chief officer and himself. Later the launch of the Hong Kong police came alongside and took the appellant and the chief officer to the hos-

In England, Brett, L. J., said, in *The Parlement Belge*, L. R. 5 P. D. 197, 208: "The first case to be carefully considered is, and always will be, *The Exchange*."

More recently in *Chung Chi Cheung v. The King*, 1939 A. C. 160, 168, a case discussed in detail hereafter, Lord Atkin, speaking for the Judicial Committee of the Privy Council, called Chief Justice Marshall's opinion in the case of *The Exchange* "a judgment which has illumined the jurisprudence of the world."

⁷ 97 U. S. 509, 515.

⁸ 183 U. S. 424.

⁹ 100 U. S. 158, 165.

¹⁰ P. 433.

¹¹ 1939 A. C. 160.

pital. The appellant was tried in Hong Kong for murder "in the waters of this colony," convicted, and sentenced to death. He carried the case on appeal to the Judicial Committee of the Privy Council, and Lord Atkin delivered the judgment. He first referred to the report of the Royal Commission on the reception of fugitive slaves in 1876, in which the extraterritoriality of a public vessel was discussed at length by Chief Justice Cockburn and other distinguished English lawyers.¹² Lord Atkin rejected, as had Chief Justice Cockburn in that report, the theory of "objective extraterritoriality," of a ship being a "floating island," a detached piece of the territory of the nation whose flag she flies. He quoted at length and with approval the opinion in *The Exchange*, and concurred fully in the general principle that the armed forces of one Power allowed by another to enter its territory enjoy immunity from the local courts, but held that in the case before him the Chinese Government had waived that immunity.

In the Casa Blanca case¹³ the Permanent Court of Arbitration at The Hague recognized the general principle of the immunity of troops in a friendly foreign country. On September 25, 1908, six deserters from the French Foreign Legion, three of whom were Germans, applied for protection to the German consul at Casa Blanca, Morocco. Morocco was nominally an independent country under the rule of its own sultan, but troops of the French Foreign Legion were with his consent camped in and around Casa Blanca. Citizens of the European Powers enjoyed an extraterritorial position and could be tried only by their own consuls. Representatives of the German consul attempted to escort the six deserters to the water front and place them upon a German vessel about to depart. On the way a detachment of French soldiers forcibly took them from their escort. Germany protested and demanded the restitution to her of the three deserters who were German nationals, and the matter was submitted to the Permanent Court of Arbitration. It will be observed that there was in this case a conflict between two different sorts of extraterritorial immunity: first, that of soldiers in a friendly foreign country subject to the exclusive jurisdiction of their own officers and military tribunals; and, second, that of Europeans in a semi-civilized country subject to the exclusive jurisdiction of their own consuls under the régime of capitulations. Among the considerations motivating its decision, the court mentioned the following:

Whereas, under the extraterritorial jurisdiction in force in Morocco the German consular authority as a rule exercises exclusive jurisdiction over all German subjects in that country; and

Whereas, on the other hand, a corps of occupation as a rule also exercises exclusive jurisdiction over all persons belonging to it; and . . .

Whereas, the jurisdiction of the corps of occupation should have the preference in case of a conflict when the persons belonging to this corps

¹² 1876, Cmd. 1516.

¹³ This JOURNAL, Vol. 3 (1909), p. 755; Martens, *Nouveau Recueil Général*, 3rd Series, II, 19; Wilson, *Hague Arbitration Cases*, p. 86.

have not left the territory which is under the immediate, lasting, and effective control of the armed force; . . .

The court decided, in the first place, that the German consulate was in the wrong in attempting to place on board a German ship deserters from the French Foreign Legion not of German nationality; and, further, that it "did not, under the circumstances of the case, have a right to grant its protection to the deserters of German nationality," but that the French military authorities ought to have respected "as far as possible" the actual protection being granted in the name of the German consulate. The court did not direct the restitution of the deserters to Germany. The award has been severely criticized as obscure and ambiguous;¹⁴ but one fact stands out, that the court recognized the exclusive jurisdiction of the officers and military tribunals of a nation over its own troops in a friendly foreign country.

When we turn from adjudicated cases to authoritative writers on international law, we find the same doctrine stated. Thus Wheaton says:¹⁵

A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sovereign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place.

In Section 99, Wheaton adopts as his own a part of the language in Chief Justice Marshall's opinion in the case of *The Exchange*.

Dr. Charles Cheney Hyde says:¹⁶

Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which, with the consent of the territorial sovereign, enters its domain. Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up.

The late Major Birkhimer said:¹⁷

It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place.

When we turn to England, we find the same doctrines announced. Wheaton's classic work has gone through six English editions, and the several learned editors have never seen fit to question the original text.

An English writer of high authority, the late Professor Westlake, contented himself with quoting with approval the passage already cited herein from Wheaton.¹⁸

¹⁴ This JOURNAL, *ibid.*, p. 698; Oppenheim, *International Law* (4th ed.), I, 672, n. 1.

¹⁵ *Elements of International Law*, Sec. 95.

¹⁶ *International Law*, I, Sec. 247.

¹⁷ *Military Government and Martial Law*, Sec. 114.

¹⁸ Westlake, *International Law* (1910 ed.), Part I, p. 265.

In Hall's *International Law* ¹⁹ it is said:

Military forces enter the territory of a state in amity with that to which they belong, either when crossing to and fro between the main part of their country and an isolated piece of it, or as allies passing through for the purposes of a campaign, or furnishing garrisons for protection. In cases of the former kind, the passage of soldiers being frequent, it is usual to conclude conventions, specifying the line of road to be followed by them, and regulating their transit so as to make it as little onerous as possible to the population among whom they are. Under such conventions offences committed by soldiers against the inhabitants are dealt with by the military authorities of the state to which the former belong; and as their general object in other respects is simply regulatory of details, it is not necessary to look upon them as intended in any respect to modify the rights of jurisdiction possessed by the parties to them respectively. There can be no question that the concession of jurisdiction over passing troops to the local authorities would be extremely inconvenient; and it is believed that the commanders, not only of forces in transit through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offences committed by persons under their command, though they may be willing as a matter of concession to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow of the case being watched. The existence of a double jurisdiction in a foreign country being scarcely compatible with the discipline of an army, it is evident that there would be some difficulty in carrying out any other arrangement.

Lawrence, another English writer, said:²⁰

. . . The universally recognized rule of modern times is that a state must obtain express permission before its troops can pass through the territory of another state. . . . Permission may be given as a permanent privilege by treaty for such a purpose as sending relief to garrisons, or it may be granted as a special favor for the special occasion on which it is asked. The agreement for passage generally contains provisions for the maintenance of order in the force by its own officers, and makes them, and the state in whose service they are, responsible for the good behavior of the soldiers towards the inhabitants. In the absence of special agreement the troops would not be amenable to the local law, but would be under the jurisdiction and control of their own commanders, as long as they remained within their own lines or were away on duty, but not otherwise.

Another learned British author, Oppenheim, until his death Whewell Professor of International Law at the University of Cambridge, said:²¹

Whenever armed forces are on foreign territory in the service of their home State, they are considered extraterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a

¹⁹ 7th ed., Sec. 56.

²⁰ Principles of International Law (6th ed.), Sec. 107, p. 246.

²¹ International Law (4th ed.), Vol. I, Sec. 445.

member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State. This rule, however, applies only in case the crime is committed, either within the place where the force is stationed, or in some place where the criminal was on duty; it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them.

French legal writers express the same view. Thus Maître Clunet in a note on *La Présence des Alliés en France et l'Exterritorialité*, says:²²

En principe, là où une armée est réunie sous le drapeau national, pour défendre la cause nationale, elle transporte avec elle un pouvoir juridictionnel et les éléments de puissance utiles à sa propre conservation. Par le moyen de ses conseils de guerre et dans l'aire du territoire où ses troupes évoluent encore que ce territoire soit étranger, — l'armée occupante réprime les infractions par les individus, militaires ou non, prévues par la loi militaire.

Mademoiselle Aline Chalufour, in an able thesis, says:²³

Le principe dominant en la matière est celui-ci: Une armée opérant sur un territoire étranger est entièrement soustraite à la souveraineté territoriale et possède une juridiction exclusive sur les membres qui la composent. Sur ce point la doctrine, les législations et la pratique sont d'accord, qu'il s'agisse d'*occupatio bellica*, d'occupation convenue résultant d'un traité, d'occupation de police ou simplement comme dans le cas qui nous occupe, de la présence des troupes sur un territoire dans un but de coopération avec l'armée du pays.

A learned Dutch writer, L. Van Praag, is even more definite and positive. He says:²⁴

Le consentement donné par un état, relativement au séjour sur son territoire de troupes organisées, n'implique pas seulement—on l'admet généralement—en l'absence de conditions mises à l'octroi de ce consentement, la reconnaissance de la compétence de leur propre juge militaire pour exercer la juridiction sur ces troupes; il entraîne en même temps pour elles l'immunité de la juridiction locale en affaires pénales, aussi longtemps qu'un lien existe entre l'auteur d'un délit et sa troupe.

Dr. Van Praag appends to the section quoted many citations, especially of continental writers, in support of his statement.

The German statute law, unless it has been changed by the Nazi government since the outbreak of the present war, is and has been for many years that the German Army has the right to try its own personnel in its own

²² *Journal du Droit International*, Vol. 45, pp. 514, 516. An earlier note to the same effect by the same learned author is found in the same journal, Vol. 9, pp. 511, 520.

²³ *Le Statut Juridique des Troupes Alliées pendant la Guerre 1914-1918*, p. 45.

²⁴ *Jurisdiction et Droit International Public*, Sec. 246.

courts and under German law, wherever they may be serving.²⁶ The German forces serving in the territory of their ally, Turkey, during the first World War, exercised such jurisdiction to the exclusion of the Turkish courts.²⁶

When we turn to Latin America we find the same view to be held. In Republic of Panama *c. Schwartzfinger*, the Supreme Court of that republic had before it a prosecution of a soldier of the United States Army, who, while driving an ambulance on duty in Panama, caused the death of a civilian. The court held:²⁷

It is a principle of international law that an armed force of one state, when crossing the territory of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign, but to that of the officers and superior authorities of its own command.

The Bustamante Code, annexed to the Convention on Private International Law adopted at Havana, February 20, 1928,²⁸ and now in force between most of the states of Latin America, provides as follows:

Art. 299. Nor are the penal laws of the State applicable to offenses committed within the field of military operations when it authorizes the passage of an army of another contracting State through its territory, except offenses not legally connected with said army.

Let us next turn to another continent, Africa. A British soldier driving an automobile on duty in Egypt ran over the plaintiff. The British civil authorities found the driver without blame and refused to make compensation. Thereupon the plaintiff sued Colonel John, the British Commander-in-Chief, in the Egyptian courts. In *Amrane c. John*,²⁹ in 1934, the civil tribunal of Alexandria held itself to be without jurisdiction and said that by custom and without formal convention British military personnel had been exempt from process of the local courts.

The foregoing citations show that, according to a principle of international law recognized by British, American, and other authorities, permission by one nation for the troops of another to enter or remain in the former's territory carries with it extraterritoriality, an exemption of the troops in question from the courts of the country and a permission for the operation of the courts-martial of the visiting army. The above principle is in truth but an

²⁶ *Militärstrafgesetzbuch für das Deutsche Reich*, June 20, 1872, Sec. 7, republished June 16, 1926, in *Reichsgesetzblatt*, Part I, p. 275 *et seq.*; *Militärstrafgerichtsordnung*, Dec. 1, 1898, Sec. 1. I am indebted for these citations to Dr. George M. Wunderlich.

²⁷ "*Die Gerichtsbarkeit der Heeresgruppe Yildirim*," by Dr. Georg Wunderlich, *Mitteilungen der Deutschen Gesellschaft für Völkerrecht*, Heft II, 1932, pp. 79, 87-89.

²⁸ This JOURNAL, Vol. 21 (1927), p. 182. The headnote quoted was prepared by the present writer's learned colleague, Colonel William C. Rigby, U. S. Army, Retired.

²⁹ Final Act of the Sixth International Conference of American States, p. 16.

³⁰ *Journal du Droit International*, Vol. 62, p. 194.

application of a much larger principle, which is expressed in a Latin maxim, *Cuiusque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit*.³⁰ The illustration of this principle with which Americans are most familiar is the doctrine of implied powers in constitutional law, laid down by Chief Justice Marshall. With respect to that doctrine, the Supreme Court said in *Marshall v. Gordon*:³¹

The rule of constitutional interpretation announced in *McCulloch v. Maryland*, 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it.³²

Let the above general principle, enshrined in a maxim, be applied to the present problem. Nation B has invited the troops of Nation A to enter its territory, or at least consented to their entry. That permission would be nugatory if no courts-martial might be held in those forces. Without such courts, discipline could not be maintained and those forces would cease to be an army and would become a mob. Also, the intervention of the courts of a foreign even if friendly country in the discipline of an army would be destructive of that discipline and inconsistent with the control which any sovereign nation must have of its own army.

In nearly every civilized country the carrying of arms and the possession of explosives are forbidden, or at least regulated, by law. Let it be supposed that such is the case in Nation B, the host nation. Would the soldiers of Nation A, in B by B's invitation or consent, be subject to trial and conviction in the local courts because they had not complied with the law of B on such matters? Clearly, the answer must be in the negative. No one would contend otherwise. Why is this so? Because of the principle above mentioned. B has granted to A permission to land and maintain its troops in B.

³⁰ Broom's *Legal Maxims*, 8th ed., p. 367. For the benefit of him whose recollection of Latin pronouns has been dimmed by the lapse of years, the foregoing may be translated, "whoever grants a thing to any one is deemed also to grant that without which the grant itself would be of no effect."

³¹ 243 U. S. 521, 537.

³² Another and older application of this broad principle is a way by necessity. Blackstone says (2 Commentaries 36): "A right of way may also arise by act and operation of law; for if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without trespass. For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same."

To the same effect is 19 *Corpus Juris*: "Easements," Sec. 117.

Among the many English cases recognizing and applying the maxim are *Kielley v. Carson*, 4 Moore, P. C., 63, 87; and *Clarence Railway Company v. Great North Railway Company*, 13 Meeson and Welsby 706, 719. In the latter case it was held that when an Act of Parliament empowered one railway company to carry its line across that of another by a bridge, the former might place temporary scaffolding on the land of the latter without its permission, if that were necessary for constructing the bridge.

Even though the grant contains no express authority for them to carry arms or possess explosives, permission to do so is implied; since otherwise they would not be military or naval forces, and could not perform the duties for which they were sent to B. The same is true with respect to the functioning of courts-martial and exemption from the civil courts. If its courts-martial could not function to repress crimes and military offenses, or if the courts of B might concern themselves with the discipline of the army of A, it would lose its discipline and efficiency and cease to be an army worthy the name.

The theory of Chief Justice Marshall's opinion in the case of *The Exchange*, and of the other authorities quoted, is that there is an agreement between the host Nation, B, and Nation A, implied from B's consent for A's troops to enter B's territory, that those troops while in B shall be under the exclusive jurisdiction of their own military courts. It is, however, clearly permissible, and in many cases highly desirable, to have an express agreement on the subject, rather than for the matter to be left to implication. It is therefore appropriate to ascertain what, if any, agreements have been made on various occasions. In many instances A's troops have entered B under a general invitation without stipulations as to jurisdiction, and later an agreement on the subject has been made and reduced to writing.

As has already been said, the example of the presence of friendly troops in another country involving the largest number of men occurred during the first World War. French and English troops were in Belgium by invitation of that country from the early days of that war until the armistice. The first agreement between two of the Allied Powers with respect to jurisdiction over troops in a friendly foreign country was between France and Belgium, made August 14, 1914, when the war was less than two weeks old. By it, each country recognized the exclusive jurisdiction of the other over the personnel of its own forces.³³ That agreement served as the model for many others which followed it.

During the first World War, millions of soldiers of the United States, the British Empire, and other allied countries were in France by invitation of the government of that nation. The English were present from the early days of the war in August, 1914. There was at first no agreement regarding jurisdiction over them; but on December 15, 1915, nearly a year and a half after the beginning of the war, the two governments made a joint declaration of which the following is the important paragraph:

His Britannic Majesty's Government and the Government of the French Republic agree to recognize during the present war the exclusive competence of the tribunals of their respective Armies with regard to persons belonging to these Armies in whatever territory and of whatever nationality the accused may be.³⁴

³³ Chalufour, *op. cit.*, p. 47.

³⁴ London Gazette, Dec. 15, 1915; Foreign Relations of the United States, 1918, Supp. 2, p. 735.

Mlle. Chalufour mentions³⁵ the following conventions as recognizing the same immunities in the case of other friendly foreign forces: Franco-Servian, December 14, 1916; Franco-Italian, September 1, 1917; Franco-Portuguese, October 15, 1917; and Franco-Siamese, May 24, 1918.

General Pershing landed in France at the head of the first detachment of the American Expeditionary Forces on June 13, 1917. Brigadier General (later Major General) Walter A. Bethel, who was judge advocate of those forces during their entire stay in France, said in his final report to their Commander-in-Chief, August 19, 1919:³⁶

... There had been received from France a bare invitation to send our armies to coöperate with hers without any agreement whatsoever as to the legal relations of the forces and as to the status of an American Army on French soil. On inquiry, however, at the French War Office, upon our arrival in France, it was found that the French view was precisely the same as our own; that under the general principles of international law members of the American Expeditionary Forces were answerable only to American tribunals for such offenses as they might commit in France. As the principle needed a somewhat broader scope, however, than its mere application to our Army in France, it was later agreed between the diplomatic departments of the governments that each should possess exclusive criminal jurisdiction over its land and sea forces whether in the territory of either nation or on high seas. This agreement was published in Bulletin No. 13, G.H.Q., February 18, 1918.

The agreement to which General Bethel alluded took the form of an exchange of notes between the Secretary of State and the French Ambassador at Washington.³⁷ The important part of it is in language almost identical with that of the earlier Franco-British agreement. That part reads thus:

The Government of the United States of America and the Government of the French Republic agree to recognize during the war the exclusive jurisdiction of the tribunals of their respective land and sea forces with regard to persons subject to the jurisdiction of those forces whatever be the territory in which they operate or the nationality of the accused.

There were in France at the date of the armistice about 2,100,000 American soldiers. Their behavior and discipline were generally excellent, but a few of them occasionally misconducted themselves. When they did so, they were arrested by their own officers, their own military police, or French police, whichever might have observed the offense or first caught the offender; but, if the French police made the arrest of an American offender, they invariably turned him over to the American military authorities at the first convenient opportunity, and he was always tried by a court-martial

³⁵ *Op. cit.*, p. 51. These conventions were published in the *Journal Officiel* on the dates mentioned, respectively.

³⁶ P. 12.

³⁷ It is published in *Foreign Relations of the United States*, 1918, Supp. 2, pp. 735-737.

of the United States Army and never by a French court.³⁸ This was true whether his offense was a purely military one, such as desertion; or a crime against another American, such as larceny from an American fellow soldier; or one against the person or property of a Frenchman, such as assault and battery upon him or burglary of his house; and whether the offense was committed in an American camp or a French village. There were scores of trials of American soldiers before American courts-martial for offenses against French men or women or their property, ranging from cases of street brawls or petty larceny in which a minor penalty was inflicted to a few of rape or murder in which the American court-martial imposed the death penalty and the offenders were hanged. The French civil and military authorities coöperated by summoning any French witnesses who might be needed. If an American soldier was charged with an offense against the person or property of a Frenchman, and the French authorities so desired, they were allowed to have an observer present at the trial. In general, the sentences imposed by American courts-martial were at least as severe as would have been given by French courts for like offenses, and there was no complaint by the French authorities against the working of the American system of military justice.

The case of *Ministre Public c. Pratt*³⁹ illustrates the caution of the French courts in prosecuting an American who might fall within the Franco-American convention. Pratt, formerly a captain in the American Expeditionary Forces, was charged with the fraudulent conversion of property of the French Republic. The court of first instance and the court of appeal held that the French courts were incompetent, and that Pratt was subject only to the American military jurisdiction. Thereafter the American military authorities stated that, because Pratt had been separated from the service, they no longer had power to try him. Nevertheless, it was only after the French Government had certified that there was no objection from the point of view of France's international obligations that the French judiciary would entertain the prosecution.

An agreement in identical language with that between the United States and France was made by exchange of notes between the Secretary of State and the Belgian Ambassador in Washington.⁴⁰

Negotiations on the subject between the Governments of the United States and Great Britain extended over a period of two years and a half during the World War.⁴¹ The British Government began those negotiations Septem-

³⁸ Final Report of the Judge Advocate, American Expeditionary Forces, p. 13; Foreign Relations of the United States, 1918, Supp. 2, pp. 745-747; Sec. I, Bulletin 88, General Headquarters, A.E.F., Oct. 31, 1918; Chalufour, *op. cit.*, p. 57.

³⁹ Cour de Cassation, Chambre Criminelle, Aug. 13, 1920; 48 *Journal du Droit International*, p. 970.

⁴⁰ Foreign Relations of the United States, 1918, Supp. 2, pp. 747, 751.

⁴¹ *Ibid.*, pp. 733-760.

ber 11, 1917, by admitting the extraterritoriality of organized bodies of United States troops in Great Britain "within the limits of the quarters occupied by them," but contended that outside their quarters "they are liable to be dealt with by the English criminal courts for any offenses against the English criminal law but could not be apprehended for any purely military offense (such as desertion, absence without leave, etc.) either by their own or the English military police or by the civil police." The United States Government did not accede to the foregoing; and the British Government, as an interim measure while negotiations were going on, promulgated a regulation under the Defense of the Realm Act, of which the most important paragraph was the following:

It is hereby declared that the naval and military authority and courts of an Ally may exercise in relation to the members of any naval or military force of that Ally who may for the time being be in the United Kingdom all such powers as are conferred on them by the law of that Ally.⁴²

Later the British Government appears not to have pressed the broad claim of jurisdiction which it first made, and submitted a memorandum proposing that a member of the United States forces within British territory should not be tried by a court-martial of the United States if the charge against him were treason or any one of three other offenses, but should be tried by a civil or military court of the United Kingdom.⁴³ In answer thereto, by its dispatch No. 264, dated July 17, 1918, the Department of State said:⁴⁴

The note of the British Foreign Office dated April 26 last, with its additional proposals, is regarded by this Government as containing conditions which would create a very dangerous situation as regards the forces of this Government in British territory. The competent authorities of this Government are of the opinion that the result of entering into an agreement such as that proposed in the above-mentioned note would be a partial surrender by the American forces to the British Government of jurisdiction over the military forces of the United States located within British territorial limits for offenses committed on American warships or in American camps and would involve the lack of proper recognition of the character and competency of the existing American military tribunals.

The Department of State went on to suggest that an agreement on the subject be made between the United States and Great Britain like those already concluded between Great Britain and France and between the United States and France, which agreements recognized the exclusive competence of the courts-martial of each country to try members of its own forces. The British Government then withdrew its proposal that American soldiers charged

⁴² Foreign Relations of the United States, 1918, Supp. 2, p. 742; Final Report of the Judge Advocate, A.E.F., p. 12.

⁴³ Foreign Relations, *ibid.*, p. 745.

⁴⁴ *Ibid.*, p. 748.

with certain offenses be tried in British courts, and inquired whether the United States would enter into an agreement with it like that with France,⁴⁵ and later transmitted a draft of such an agreement;⁴⁶ but, as the armistice had been signed and the troops of the United States were being withdrawn from the British Isles, it was never executed.⁴⁷ Nevertheless, so far as is recalled by officers of our Army who were in a position to know the facts, no trial of a soldier of the American Expeditionary Forces by a British court actually occurred.

In Article 10 of the military agreement subsidiary to the Treaty of Alliance between Great Britain and Iraq of October 10, 1922,⁴⁸ it was stipulated that the British Government should exercise military jurisdiction over its British and Indian forces, and that the members of such forces, civilian officials, and "Indian public followers" should be immune from arrest, search, trial, or imprisonment by the civil power in Iraq in respect of criminal offenses, and immune from civil process in respect of any act done in performance of military or official duties. These immunities and privileges in jurisdictional matters were confirmed and continued by Article 2 of the Annex to the Treaty of Alliance of June 30, 1930, between the same governments.⁴⁹

In 1936, two years after the case of *Amrané v. John*, *supra*, the British Government recognized the complete sovereignty of the King of Egypt and entered into an alliance with him, one of the conditions of which was a convention concerning the immunities and privileges to be enjoyed by the British forces in Egypt.⁵⁰ Article 4 of that convention provided:

4. No member of the British Forces shall be subject to the criminal jurisdiction of the courts of Egypt, nor to the civil jurisdiction of those courts in any matter arising out of his official duties.

Other articles extend judicial immunity also to certain British civil officials and to the wives and children of British military and civil personnel.

After the present war began, but before the United States became a belligerent, by exchange of diplomatic notes of September 2, 1940, in return for the cession of fifty destroyers, the United States obtained from Great Britain the right to lease naval and air bases in Newfoundland, Bermuda, the Bahamas, Antigua, Jamaica, St. Lucia, Trinidad, and British Guiana. The United States Government soon afterward sent a delegation to London, including representatives of the Department of Justice, the Army, and the Navy, to negotiate under the supervision of the American Ambassador at London with the British Government as to various matters concerning those bases. After several months of discussion, an agreement was signed at

⁴⁵ Foreign Relations of the United States, 1918, Supp. 2, pp. 751-2.

⁴⁶ *Ibid.*, p. 754.

⁴⁷ *Ibid.*, p. 760.

⁴⁸ Great Britain, Treaty Series No. 17 (1925), Cmd. 2370.

⁴⁹ *Ibid.*, No. 15 (1931).

⁵⁰ *Ibid.*, No. 6 (1937), Cmd. 5360; this JOURNAL, Supplement, Vol. 31 (1937), p. 77.

London on March 27, 1941, Article IV of which, quoted in full in the margin, deals with jurisdiction.⁵¹

That article does not, in so many words, allow to the United States military and naval personnel in the British colonies containing the leased bases that full and complete immunity from jurisdiction of local courts allowed to visiting forces by Marshall in the case of *The Exchange*, by other judges and writers, and by the several conventions already mentioned. It mentions certain classes of offenses, as to which "the United States shall have the absolute right in the first instance to assume and exercise jurisdiction"; but goes on to say that, if the United States does not elect to do so, the offender shall be surrendered to and brought to trial by the appropriate local authorities. Among such are offenses of a military nature, including treason, sabo-

⁵¹ARTICLE IV. JURISDICTION

(1) In any case in which

(A) A member of the United States forces, a national of the United States or a person who is not a British subject shall be charged with having committed, either within or without the leased areas, an offence of a military nature, punishable under the law of the United States, including, but not restricted to, treason, an offence relating to sabotage or espionage, or any other offence relating to the security and protection of United States naval and air bases, establishments, equipment or other property or to operations of the Government of the United States in the territory; or

(B) A British subject shall be charged with having committed any such offence within a leased area and shall be apprehended therein; or

(C) A person other than a British subject shall be charged with having committed an offence of any other nature within a leased area, the United States shall have the absolute right in the first instance to assume and exercise jurisdiction with respect to such offence.

(2) If the United States shall elect not to assume and exercise such jurisdiction the United States authorities shall, where such offence is punishable in virtue of legislation enacted pursuant to Article V or otherwise under the law of the territory, so inform the Government of the territory and shall, if it shall be agreed between the Government of the territory and the United States authorities that the alleged offender should be brought to trial, surrender him to the appropriate authority in the territory for that purpose.

(3) If a British subject shall be charged with having committed within a leased area an offence of the nature described in paragraph (1) (A) of this article, and shall not be apprehended therein, he shall, if in the territory outside the leased areas, be brought to trial before the courts of the territory; or, if the offence is not punishable under the law of the territory, he shall, on the request of the United States authorities, be apprehended and surrendered to the United States authorities and the United States shall have the right to exercise jurisdiction with respect to the alleged offence.

(4) When the United States exercises jurisdiction under this article and the person charged is a British subject, he shall be tried by a United States court sitting in a leased area in the territory.

(5) Nothing in this agreement shall be construed to affect, prejudice or restrict the full exercise at all times of jurisdiction and control by the United States in matters of discipline and internal administration over members of the United States forces, as conferred by the law of the United States and any regulations made thereunder. (H. Rep. Doc. 158, 77th Cong., 1st Sess.; this JOURNAL, Supp., Vol. 35 (1941), p. 136.)

tage, and espionage, which may be committed by members of the United States forces in the colonies in which the bases are located, either within or without the leased areas, and offenses "of any other nature" (which includes the usual common law and statutory felonies and misdemeanors) when committed by "a person other than a British subject" (which of course includes members of our armed forces) within the leased areas. The agreement is surprisingly silent with respect to jurisdiction over our military and naval personnel in respect of non-military offenses committed by them outside of the leased bases, *e.g.*, a larceny by one of our soldiers of the property of a native in Port-of-Spain, Trinidad, or an assault by a sailor of our Navy on a Newfoundlander in the streets of St. John's. Under our own military law, such offenses are undoubtedly triable by our own Army or Navy courts-martial, as military and naval jurisdiction is personal, not territorial, and follows the soldier or sailor wherever he may go on the face of the earth.⁶²

It may be argued that, in view of the silence of the agreement with respect to this class of offenses, the general principle stated by Marshall and so many other authorities applies, namely, that the visiting forces are subject only to their own military tribunals, and not to the local courts. It may also be contended that, as the commission of any crime or offense by a soldier at any time or place, on or off duty, is a breach of discipline, paragraph (5) of the article governs and gives the United States exclusive jurisdiction.

These arguments are not convincing. This appears to be an appropriate occasion for the application of the maxim, *expressio unius est exclusio alterius*. Article IV mentions certain classes of cases in which the United States is to have a preferential right to exercise jurisdiction. If it had been intended to include the class now under consideration, that class would have been mentioned. Its inclusion would have given the United States a preferential right to try its own soldiers and sailors in all cases; and, if that had been the intention of the negotiators, no enumeration of classes of offenses would have been necessary. The argument based on paragraph (5) may also be answered by calling attention to the fact that the word "discipline" is joined with the words, "internal administration," and the latter expression clearly shows that the former is not intended to have so broad a meaning as the argument attributes to it.

It may be concluded, therefore, with respect to offenses of a non-military character committed by our soldiers or sailors outside of the leased bases, that Article IV contemplates concurrent jurisdiction in the American courts-martial and the local courts. The offender is triable in either tribunal.

This brings us to the present war. The first allied country to which the United States sent a considerable force was Australia. On December 17,

⁶² Articles of War, introductory sentence, Art. 2, 93, and others; 10 U. S. Code, 1471, 1473, 1565; Digest of Opinions of the Judge Advocate General, U. S. Army, 1912, p. 511, par. VIII B; this author, "The Army Court-Martial System," 1941 Wisconsin Law Review, 311, 320; Articles for the Government of the Navy, introductory sentence, 34 U. S. Code, 1200.

1941, ten days after the entry of the United States into the present belligerent, but before any United States forces had reached the Government of Australia issued an order in council or statute with respect to courts-martial of foreign forces in that country, took to restrict such courts to "matters concerning discipline administration" and contemplated the concurrent jurisdiction over the personnel of such forces. Later, on May 27, 1942, the Government of Australia promulgated an amendment to the foregoing,⁵⁴ as follows:

- 6.—(1) Notwithstanding anything contained in regulations or Regulations, where any member of the United States Forces in Australia is arrested or detained on a charge of having committed an offence against the law of the Commonwealth or of any State or Territory of the Commonwealth, the appropriate officer of the United States Forces shall be notified and, if he so requests, the member shall be taken to him and shall thereupon cease to be subject to the jurisdiction of the criminal courts in Australia, and the appropriate naval court constituted in accordance with the law of the United States of America applicable to the United States Forces in Australia shall exercise in relation to the member such powers as are conferred by that law.

The above quotation shows that the United States forces have, in every case in which they care to ask for it, exclusive jurisdiction over their own personnel. From an Associated Press dispatch of May 27, 1942,⁵⁵ the date of issue of the amendatory regulation, it appears that the Australian Ministry was questioned about the matter in the floor of the House of Representatives of that Commonwealth; and Mr. Curtin, the Premier, answered as follows:

Having regard for the practice we ourselves insisted on that members of the Australian Imperial Force serving in the United States should be adjudged by the law of this land and under the authority of our commanding officer—this regulation is entirely consistent with the development of policy governing the matter.

News dispatches have told of the trial in Melbourne in July 1942 of a court-martial of the United States Army of Private Edward J. Bremer, United States Army, for the murder of three women, of his conviction, and of the imposition by the court of a death sentence.

There are also American forces in considerable number in the United Kingdom of Great Britain and Northern Ireland. Before the United States entered the war, the British Parliament passed the Allied Forces Act, 1941. Notwithstanding the encomiums of English judges on the opinion of Justice Marshall in the case of *The Exchange*,^{supra}, the drafts

⁵⁴ No. 302, 1941.

⁵⁵ Statutory Rule No.

⁵⁶ Evening Star, Washington, D. C., May 27, 1942.

⁵⁷ 3 & 4

Act appears to have overlooked or disregarded it, as well as the views of authoritative English writers on international law and the agreement between his own country and France during the World War, all recognizing the exclusive jurisdiction of the courts-martial of visiting forces over the personnel of those forces. The Act begins, Section 1(1), as follows:

1.—(1) Where any naval, military, or air forces of any foreign Power allied with His Majesty are for the time being present in the United Kingdom or on board any of His Majesty's ships or aircraft, the naval, military and air force courts and authorities of that Power may, subject to the provisions of this Act, exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that Power.

A mere legislative recognition by the Parliament of Great Britain of the right of courts-martial of foreign forces in Great Britain to function, in accordance with the principle of international law above mentioned, would be unobjectionable to any other country and might be advantageous from the British standpoint; but the language of the Act shows that subsection 1(1) is something quite different. That subsection itself, above quoted, says that foreign courts-martial may function in England "subject to the provisions of this Act." In other words, the foreign court-martial may function in so far as the British Act of Parliament authorizes or allows it to do so.

Subsections 2(2) and 2(3) also speak of the courts-martial of the visiting forces having jurisdiction "by virtue of the foregoing section," *i.e.*, Section 1, showing that it is the theory of the Allied Forces Act that foreign courts operate in Britain by authority of that Act, that it is a delegation of power to them. This view is believed to be unsound. The courts-martial of the armed forces of any nation derive each and all their powers from the laws of that nation, and can accept no grant of power from any other.

Section 2(1) of the Act expressly recognizes the concurrent jurisdiction of British civil courts over the personnel of visiting forces, and is therefore inconsistent with the well-established principle of the exclusive jurisdiction of the courts-martial of the visiting forces. Section 2(3) of the Act says that the courts-martial of visiting forces shall *not* have jurisdiction of certain cases. No nation can admit that another shall tell it that it may not try its own soldiers before its own courts-martial in certain cases.

It is, therefore, not surprising that, as soon as it was foreseen that United States forces would be sent to the British Isles, negotiations were begun between the two governments as to the status of those forces. After considerable discussion, the British Government agreed that the United States should have exclusive jurisdiction over the personnel of its own forces, whether on duty or off, and whether within their own quarters or without. That agreement has been embodied in an exchange of diplomatic notes, dated July 27, 1942, and in an Act of Parliament approved by the King

August 6, 1942.⁸⁷ The notes are printed in the schedule annexed to the Act. The notes and the Act recognize to the fullest degree the exclusive jurisdiction of the courts-martial of the United States over our soldiers and sailors. Section 1 (1) provides:

1.—(1) Subject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America:

Provided that upon representations made to him on behalf of the Government of the United States of America with respect to any particular case, a Secretary of State may by order direct that the provisions of this subsection shall not apply in that case.

The British note speaks of "the very considerable departure which the above arrangements will involve from the traditional system and practice of the United Kingdom." In the debate in the House of Commons, members referred to the bill as a "striking innovation" and as being "of a completely revolutionary character."⁸⁸ The Act does not deserve such description. As has been shown, substantially all the authorities and precedents support it, including the precedent of the exclusive jurisdiction exercised by the British Army over its personnel in France during the first World War, and the like exclusive jurisdiction conceded in fact to our forces over their personnel by Great Britain during the first World War, though that concession was not embodied in a formal exchange of notes. Since the passage of the Act, the newspapers have carried an account of the trial and acquittal by court-martial of the United States Army of an American soldier tried for rape of an Englishwoman.

It goes without saying that it is the right and duty of the government of the host country to make sure that the persons and property of its nationals are effectively protected against crimes by members of the visiting forces, and that the latter's immunity from prosecution in the local courts is not used as a cloak to enable them to commit such crimes with impunity. In the several expeditionary forces which the United States sent to friendly foreign countries in the first World War and in others, the military and naval officers in command have always been ready to prosecute before their own courts-martial any member of their own forces against whom the local authorities (or any individual national of the host country) presented *prima facie* evidence of having committed a crime or offense. In his note to the British Secretary of State for Foreign Affairs, dated July 27, 1942, the American Ambassador at London wrote:

In order to avoid all doubt, I wish to point out that the Military and Naval authorities will assume the responsibility to try and on conviction

⁸⁷ 5 & 6 Geo. 6, c. 31.

⁸⁸ Parliamentary Debates, House of Commons, Official Report, Aug. 4, 1942, Vol. 382, pp. 902, 910.

to punish all offences which members of the American Forces may be alleged on sufficient evidence to have committed in the United Kingdom.

What does the foregoing survey show to be the legal situation of friendly foreign armed forces? It shows, in the first place, by substantial unanimity of opinion among judges and writers on international law, and according to many international agreements, that the invitation or permission of the host country to enter its territories carries with it, at least unless clearly denied, an implied exemption or immunity of the personnel of visiting forces from the jurisdiction of the local courts and a consent to the functioning of the courts-martial of such forces. In other words, the permission to enter carries with it an implied but none the less clear and definite consent to the exclusive jurisdiction over such forces of their own courts-martial.

The only question in doubt is how far such immunity from the local courts extends. In the first place, does it follow the visiting soldier at all times and in all places while he is within the host country, or only part of the time and in some places? In its negotiations with the United States during the first World War, the British Government began by admitting the extra-territoriality of United States troops "within the limits of the quarters occupied by them."⁸⁹ Lawrence, in the passage already quoted, says that the visiting troops would not be amenable to local law, but would be under the jurisdiction and control of their own commanders, "as long as they remained within their own lines or were away on duty, but not otherwise." Oppenheim, in the paragraph previously quoted, says that the exemption from the local courts "applies only in case the crime is committed, either within the place where the force is stationed, or in some place where the criminal was on duty; it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime."

On the other hand, neither the other writers on international law nor Chief Justice Marshall in his opinion in the case of *The Exchange* make any exceptions based upon whether the soldiers are on or off duty, or are within or without their own camps. None of the several international agreements which have been mentioned makes any such distinction, except that between the United States and Great Britain respecting the leased bases in British possessions in the Western Hemisphere.

The objection to the distinction is that, under the conditions of modern warfare, it becomes illusory. There no longer exists such a situation as that of which Professor Oppenheim spoke, of soldiers belonging to a foreign garrison leaving "the *rayon* of the fortress." There were millions of American and British soldiers in France during the first World War. The majority of them were not in separate camps or reservations, but were quartered in every village, often in the houses of the inhabitants, as this writer was on many occasions. That the situation is substantially the same in the present

⁸⁹ Foreign Relations of the United States, 1918, Supp. 2, p. 733.

war is shown by the following quotation from the syndicated column of Ernie Pyle, written from "Somewhere in Northern Ireland":⁶⁰

... there is no such thing over here as an immense camp of thousands and thousands of men like the camps back home. Anything more than a few hundred in one camp is unusual here.

The troops are dispersed all around Northern Ireland, usually in quarters formerly occupied by the British. Altho most of the troops are living in small camps, in Nissen huts, not all of them are. Others live in every conceivable way. They live in old mills, in castles, in barns, in private homes, and what not.

To say that the visiting soldier who lives under such conditions loses his immunity when he steps outside of the house in which he is billeted would make that immunity meaningless and nugatory, and defeat the very purpose which brought it into existence. Nor is the distinction between "on duty" and "off duty" more helpful. In modern warfare, that distinction also fades out. In these days of bombing from the sky, the members of an anti-aircraft battery may have to jump to their guns at any moment, the pilot of a plane may be called upon to take off at any time, and the infantryman must always be prepared to repel paratroops or commandos. Any of these things may happen when he is walking in the town square with his "girl friend" or drinking beer in the inn; and, in a broad but nevertheless accurate sense, he is always on duty.

Let us carry the matter a bit farther. Suppose foreign allied troops are in a country where fighting is going on. A column on the march to battle is halted and the men are allowed to break ranks and relax for a few moments. May a soldier who then enters a tavern and gets into a fight with a villager be held by the town constable for trial at the next assizes, because the offense was committed outside of his quarters and when off duty? No captain in any army would permit a man to be taken from his company at such a time for such a reason.

It is noteworthy that, in the one international agreement which accepted the view of Lawrence and Oppenheim, the facts more closely resembled the now obsolete situation which they had in mind. In the bases leased by Great Britain to the United States, our troops are not scattered through the villages and over the countryside, or billeted on the inhabitants. There, there is in substance a foreign garrison of a fortress, to use Oppenheim's expression. In each colony one or more tracts, accurately described by metes and bounds and usually of considerable extent, have been leased to the United States for 99 years. It is within those leased areas only that the soldier or sailor normally performs his duties and is quartered. Furthermore, those bases are so far from the enemy countries that they are relatively free from danger of bombing or invasion by paratroops or commandos. The soldier or sailor may, therefore, well submit to some change in his status when he leaves the leased area for pleasure.

⁶⁰ Washington News, Aug. 6, 1942.

It may be concluded, however, that in the absence of an agreement providing otherwise, such as that made with respect to the leased bases, the exemption of visiting forces from the jurisdiction of local courts is not limited to offenses committed in their own camps or quarters or when on duty, but exists at all times and in all places within the country which has invited or permitted the foreign troops to enter its borders.

The next question is whether the immunity of the visiting soldier or sailor extends to civil suits. In his opinion in the case of *The Exchange*, already quoted, Chief Justice Marshall referred to a waiver of "all jurisdiction" over visiting troops. In *Coleman v. Tennessee*, *supra*, the Supreme Court said that the soldier in a friendly foreign country is exempt from the "civil and criminal jurisdiction of the place." The above phrase was repeated with approval in *Dow v. Johnson*, *supra*. The view of the Supreme Court of the United States seems clearly to be, therefore, that the visiting soldiers or sailors are exempt from the civil as well as the criminal jurisdiction of the host country, i.e., they may not be sued civilly in its courts. In passages already quoted, Wheaton and Birkhimer refer to exemption from the "civil and criminal jurisdiction of the place." On the other hand, in the quotations hitherto made, Hall and Hyde refer to "offenses," Oppenheim to "crime," Clunet to "conseils de guerre" and "infractions," Van Praag to "affaires pénales," and the Bustamante Code to "penal laws," all expressions indicating that the visiting soldier is exempt from the criminal jurisdiction of the host state; but it is impossible to say whether those learned authors intended to hold that he is *not* exempt from civil suit, or whether the question of civil liability had not occurred to them.

In the passage already quoted from the agreement made between France and Great Britain during the first World War, the two countries recognized "the exclusive competence of the tribunals of their respective armies." The agreements between the United States and France and between the United States and Belgium use almost identical language. Those expressions standing alone are broad enough to cover civil suits against visiting soldiers; but in each case they are followed by other passages relating to "infringements" (probably an inaccurate translation of the French word "infractions") or "offenses," which indicate that the draftsmen of the agreements had criminal jurisdiction mainly, if not exclusively, in mind. So far as is recalled by the present writer and other officers of the United States Army who were in a position to know of it if that occurred, no civil suit was brought against any member of the American Expeditionary Forces in a British or French court during the first World War.

There is a practical reason against extending immunity so far. As has been said, the government of the host country is entitled to demand that the immunity which its visitors enjoy be not used as a cloak to enable them to commit crimes against its nationals with impunity. This may be easily prevented by prompt and adequate punishment of such offenders by the

courts-martial of their own forces. But the government of the host country is also entitled to demand that immunity from civil suit on the part of the members of the visiting forces be not used by them as a cloak to enable them to escape paying their just debts to nationals of the host country. Though the ancient High Court of Chivalry, composed of the Lord High Constable and the Earl Marshal of England, had civil as well as criminal jurisdiction over military men, that court has not sat since the reign of Queen Anne;⁶¹ and modern courts-martial, neither in the British service, nor in our own, nor in any other of which this writer is aware, have any jurisdiction of civil suits against military personnel. The only thing that a court-martial can do in such a matter is to punish a soldier for bringing discredit on the military service by dishonorably failing to pay his debts, in violation of the 96th Article of War;⁶² or, if the debtor is an officer, for conduct unbecoming an officer and a gentleman in failing to do so, in violation of the 95th Article.⁶³ Such action is not infrequently taken, but it benefits the creditor only in so far as the fear that it may be taken impels the debtor to pay up. The court-martial can only impose a sentence; it can not give a judgment ordering the debtor to pay his creditor, levy on his goods, or attach his pay. And punitive action may be taken only if the debt be undisputed. Neither a court-martial, nor the debtor's commanding officer, nor any other military authority has jurisdiction to decide whether a disputed debt is or is not legally owed; and still less has any of them authority to adjudicate an unliquidated claim sounding either in contract or tort.⁶⁴

An officer or soldier of the visiting forces may make purchases on credit at a store in the town where he is quartered, and fail to pay for them. If his own government does not furnish him quarters and subsistence, but pays him an allowance in lieu thereof and expects him to provide for himself, he may run up a bill with his landlady and fail to pay it. He may negligently or intentionally injure a national of the host state or the national's property. Another class of civil controversy which unfortunately often arises during military occupations is the question of paternity. An unmarried woman of the host country may charge that a soldier of the visiting army is the father of her child and should support him. The alleged debtor or defendant may contend that he has a good defense in each of the cases supposed. If he is clothed with immunity protecting him from civil suit in the local courts, there is no tribunal whatever in which, as a practical matter, he may be sued and the case decided according to law. Such a situation may constitute a serious wrong to the nationals of the host state, of which its government may justly complain.

⁶¹ Winthrop, *Military Law and Precedents*, original p. 49, reprint p. 46; this author, "The Army Court-Martial System," *loc. cit.*, p. 318.

⁶² 10 U. S. Code, 1568; *Manual for Courts-Martial*, U. S. Army, 1928, par. 152b.

⁶³ 10 U. S. Code, 1567, *Manual for Courts-Martial*, U. S. Army, 1928, par. 151.

⁶⁴ *Manual for Courts-Martial*, U. S. Army, par. 152b; *Digest of Opinions of The Judge Advocate General*, U. S. Army, 1912, p. 510, pars. VIII A 1 and 2.

Is there any way to reconcile the antinomy between the necessity that a military commander in war have complete and exclusive control of his men and the necessity that those men pay their just debts and obligations to the people of the country whose guests they are? Of the litigated cases in which the status of visiting forces has been in issue, *The Exchange*, *Dow v. Johnson*, and *Tucker v. Alexandroff*, *supra*, were civil and not criminal proceedings. The Casa Blanca case was an international arbitration, which, if it had been before a national and not an international court, would have been a civil and not a criminal proceeding. *The Exchange* case involved the right to control a public armed vessel of a friendly foreign sovereign. The Alexandroff and Casa Blanca cases involved the right to control the person of a visiting sailor or soldier. *Dow v. Johnson* was a suit against an army officer with the object of holding him personally liable for acts done in the line of his official duty. All the cases held that the soldier or sailor concerned was subject to the exclusive control of the officers and tribunals of his own country.

The foregoing cases point a way out of the difficulty. It is believed that, in the first place, the courts of the host country ought not to take jurisdiction of any civil suit tending to control the person of the visiting soldier or sailor. In order that the military duties, to discharge which he came to that country, may be promptly and efficiently performed, his person must at all times be within the exclusive control of his own commanding officer. Fortunately, arrest or imprisonment for debt is obsolete in Great Britain, the United States, and in most, if not all, other countries; but a court may still commit for contempt. No such committal ought to be permitted of a member of the visiting forces.

But, further than that, no suit should be entertained which even questions that complete control which the commanding officer ought to have over the persons of the members of his command, such as a petition for *habeas corpus*. No self-respecting nation would allow the courts of another, even though friendly, country to inquire into the validity of the enlistment or induction of one of its soldiers, or the legality of his confinement in its own guardhouse. Merely to permit such an inquiry to be carried on would be destructive of discipline and an affront to the ally to whose forces the soldier belongs. Our own State courts may not make such an inquiry,⁶⁵ and still less ought a foreign court to be allowed to do so.

It goes without saying that the arms and equipment of the visiting soldier or sailor are not subject to the process of the local courts. Usually they are the property of his country, and the property of a friendly foreign nation in the possession of its agents is immune to interference by the courts of the place.⁶⁶ Even if any arms or equipment should be the personal property of

⁶⁵ *Tarble's Case*, 13 Wall. 397.

⁶⁶ *Vavasseur v. Krupp*, L. R. 9 Ch. D. 351; *The Parlement Belge*, L. R. 5 P. D. 197; *Kingdom of Roumania v. Guaranty Trust Co.*, 250 Fed. 841; *Mason v. Intercolonial Ry. Co.*, 197 Mass. 349, 83 N. E. 876.

the soldier, they are required for his use in the public service of his country, and ought to be exempt on the clearest grounds of public policy.

Neither ought the visiting soldier's pay to be subject to attachment or garnishment by a court of the host country. The pay of one of our soldiers or sailors may not be attached by our own courts.⁶⁷ *A fortiori* a foreign court should not be allowed to do so.⁶⁸ Such an attachment would in effect be a suit against a friendly foreign nation, and an interference by the court of the host country with money which is the property of another nation and with the official duties which the paymaster is directed by the statutes of his own country and the orders of his superiors to perform. No nation will tolerate such interference. From the standpoint of the soldier's military efficiency, which is the determining consideration in time of war, nothing could be worse than a total stoppage of his pay.

It is also quite clear that no civil suit should be entertained by any court of the host country against an officer, soldier, or sailor for any act or omission in the line of his duty. The agreements between Great Britain and Iraq and between Great Britain and Egypt, already cited, provide for such immunity. In so acting or failing to act, he is the representative of his country, and the suit would be in substance a suit against it. Congress has passed acts setting up machinery for the payment of claims against the United States by nationals of foreign countries arising out of the operations of our forces therein.⁶⁹ If the state to which the visiting forces belong should have no such legislation, or if a particular claim should be outside its scope, the claimant should present his claim through diplomatic channels.

Furthermore, no civil suit against a visiting soldier or sailor should be brought to trial, or a default judgment rendered against him, at a time and place when it is impracticable for the soldier or sailor to appear and defend the same because of his military duties, which in time of war must come first. The members of the visiting forces ought to have the same sort of protection as is afforded to our own personnel by the Soldiers' and Sailors' Civil Relief Act.⁷⁰

Subject to the foregoing exceptions and limitations, it is believed that civil suits against members of the visiting forces ought to be allowed, though no specific authority can be cited in support of that view. To that extent, the theory of total immunity of the visiting soldier should yield to the practical necessity for a tribunal which can pass upon disputed civil liabilities of the visiting soldier, and the nation to which the visiting troops belong should waive the exemption to which in strict law they may be entitled.

⁶⁷ *Buchanan v. Alexander*, 4 How. 20.

⁶⁸ See *Kingdom of Roumania v. Guaranty Trust Co. and Mason v. Intercolonial Railway Co.*, *supra*.

⁶⁹ Acts of Apr. 18, 1918, 5 U. S. Code, 210; July 1, 1918, 34 U. S. Code, 600; Jan. 2, 1942, 55 Stat. 880.

⁷⁰ Act of Oct. 17, 1940, 54 Stat. 1178, 50 U. S. Code 501 *et seq.*

It may be argued that a right to sue so limited will be valueless. Is that true? At least a forum is provided where the legal existence and validity of the debt may be adjudicated. If the decision is for the plaintiff, the matter becomes *res judicata* in his favor and he may sue on the judgment in a court of the debtor's home country. But the creditor has a more practical remedy, and one nearer at hand, if the debtor be an American soldier. Our War Department holds that when a debt has been reduced to judgment, it is no longer open to dispute by the soldier debtor; and his continued failure to pay it, in so far as his means allow, constitutes conduct bringing discredit upon the military service, for which he may be tried and punished by court-martial.⁷¹

In paragraph 7 of his note of July 27, 1942, the British Secretary of State for Foreign Affairs stated that, though the arrangements in regard to American forces in the United Kingdom are not dependent upon a formal grant of reciprocity, it would be agreeable if the American Ambassador were to inform him that the Government of the United States would take all steps in its power to insure to British forces in the United States a like position. The American Ambassador did not answer the foregoing further than to say that "my Government agrees to the several understandings which were raised in your note." There are a few British troops in the United States. The question is therefore presented—What is their legal status? If one of them should commit a crime or misdemeanor, what court would be entitled to try and punish him?

It is submitted that the United States should allow full reciprocity on this subject, that is to say, the United States should concede to Britain the same exclusive criminal jurisdiction over the personnel of British armed forces on United States soil as Britain has conceded to us. From the exchange of notes, it is to be inferred that the Department of State is willing to do so. But the more serious question is, will American courts, State and Federal, recognize the agreement embodied in the exchange of notes and hold themselves to be without jurisdiction over offenses committed by personnel of British forces who are in this country with the permission of our Government?

If the agreement were in the form of a treaty by which each nation conceded to the other exclusive jurisdiction over that other's military and naval personnel on its soil, there would be no doubt. As treaties are, pursuant to Article VI of the Constitution, "the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding," such a treaty would be binding on both the Federal and State courts.⁷²

Is a treaty necessary in order that the courts, Federal and State, shall be

⁷¹ Dig. Op. J.A.G., 1912, p. 879, par. V; *ibid.*, 1912-40, par. 454 (46).

⁷² *Ware v. Hylton*, 3 Dallas, 199, 236; *Worcester v. Georgia*, 6 Peters 515, 561; *Hauenstein v. Lynham*, 100 U. S. 483.

bound to give up jurisdiction over British military and naval personnel to their own courts-martial? The question should be answered in the negative. The agreement by exchange of notes may not be binding upon our courts, but international law is a part of the law of the United States and is binding upon them.¹³

In *The Schooner Exchange v. McFaddon*, *Coleman v. Tennessee*, and *Dow v. Johnson*, all previously discussed herein, the Supreme Court of the United States said in the most positive language that the courts-martial of foreign troops permitted by the government of the host country to enter its territory have jurisdiction over the personnel of their own forces, to the exclusion of the local courts. Those cases, it will be noted, do not depend upon any treaty or exchange of diplomatic notes, but upon the view that the exemption of friendly foreign troops from the jurisdiction of the courts of the nation in which they are is a principle of the unwritten law of nations. It is of course impossible to foretell with mathematical accuracy how a court will decide any case; nevertheless there can be little doubt that any Federal court, before which the like question should come, would follow three decisions of the Supreme Court of the United States, one of them from the pen of the illustrious Marshall. Unless the court should disregard those opinions, it would be obliged to hold, without regard to the exchange of notes, that British military personnel forming part of an organized force entering the United States with the consent of our Government are exempt from the jurisdiction of the courts of the United States.

A case arising in a State court ought to be decided the same way, and probably would be if the above decisions were brought to the attention of the court. It is, however, possible that one or more judges of inferior courts sitting under the authority of a State, such as city police courts or rural justices of the peace, unskilled in matters of international law, might in the first instance undertake to assert their jurisdiction over such British personnel brought before them charged with an offense, and might even convict and sentence such personnel. If the Department of State should make public announcement that, in its view, the personnel of British armed forces permitted by this Government to enter the United States are subject to the jurisdiction of their own courts-martial only and exempt from that of courts of the United States and the several States; and if the Department of Justice should follow the example set in the case of *The Exchange*, and direct the appropriate United States attorney to file a suggestion, as was done in that case, that the case before the court is within the exclusive competence of a British court-martial, the likelihood of such a conviction would be still further diminished. Even if such a conviction should take place in a police court or before a justice of the peace, it should be reversed and the sentence set aside by the proper appellate court upon such a suggestion by the United States attorney and upon the three cases above mentioned being cited.

¹³ *The Paquete Habana*, 175 U. S. 677, 700.

It is concluded that the general principle is abundantly established by reason, authority, and precedent, that the personnel of the armed forces of Nation A, in Nation B by the latter's invitation or consent, are subject to the exclusive jurisdiction of their own courts-martial and exempt from that of the courts of B, unless such exemption be waived. That principle has already been expressly recognized by several of the United Nations. Its recognition by all of them, by means of formal agreement or otherwise, will contribute greatly to the military efficiency of friendly troops on the soil of an ally and will help win the war.

GOVERNMENTS AND AUTHORITIES IN EXILE*

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The governments-in-exile present new problems created by the special circumstances of this war. During World War I, belligerent occupation played an important rôle. Disregarding smaller incidents, the following occupations may be mentioned: that of Belgium and parts of France by German troops; parts of White Russia by Austro-Hungarian troops; of Serbia and Macedonia by German, Austro-Hungarian and Bulgarian troops; of Rumania by German, Austro-Hungarian and Bulgarian troops; of parts of Italy by Austro-Hungarian and German troops; of parts of Austria by Russian troops; of parts of Alsace-Lorraine by French troops; and of Palestine by British troops. As a result of the invasion of its territories the Belgian Government exercised its functions in Sainte-Adresse, France, and the Serbian Government in Corfu, Greece, but it is not known that the activity of these sovereignties-in-exile has raised any significant legal problems.¹ Since 1940 an increasing number of governments have been forced to flee their homelands in the face of hostile armed forces and have been invited by the British Government to establish themselves in the United Kingdom. We have now a "Miniature Europe" in London.² There are at present eight foreign governments in England: Belgium, Czechoslovakia, Greece, Luxembourg,³ The Netherlands, Norway, Poland and Yugoslavia.

STRUCTURE AND RECOGNITION OF GOVERNMENTS-IN-EXILE

The chief executive of these governments is a Queen in the case of The Netherlands, a King in the case of Greece, Norway, and Yugoslavia, a Grand Duchess in the case of Luxembourg, and a President in the case of Czechoslovakia and Poland. Belgium marks an exception; constitutionally it is a monarchy, but King Leopold surrendered on May 28, 1940, to the Germans and is now a prisoner living under German belligerent occupation.

* The term "exiled" or "refugee" government—although well-known today—is not very appropriate since it does not express clearly that such government is the only *de jure* sovereign power of the country, the territory of which is under belligerent occupation, but no better term has yet been coined. "Authority" is used in the English war legislation as referring to the Free French.

¹ See *Le refuge du Gouvernement National à l'Étranger*, by Andrée Jumeau, Aix-en-Provence, France (1941), dealing with the events of the last war, reviewed in this JOURNAL, Vol. 36 (1942), p. 346.

² This expression was used by the Under Secretary of State for Foreign Affairs in the House of Commons (369 Parliamentary Debates, 1940-41, p. 329).

³ The Government of Luxembourg is partly in Montreal (Canada) and partly in London (England), but both the Grand Duchess and the Prime Minister are in Canada.

The cabinets of the governments-in-exile consist of Prime Ministers and a varying number of other ministers, in particular, of foreign affairs, economics, interior, justice, labor and war. Moreover, to emphasize the democratic character of their governments, Belgium, Czechoslovakia and Poland have created a "national council" as a substitute for a parliament, composed of members of the legislative bodies of their countries who had managed to come to England.⁴

With the exception of Belgium, Czechoslovakia and Poland, the sovereignties continue to function in London without undergoing any material changes in their governments. The local authorities established in the territories under belligerent occupation and exercising administrative activities under the control of the occupying Power do not enjoy sovereignty. Under the circumstances the recognition of the governments in England of Greece, Luxembourg,⁵ The Netherlands, Norway and Yugoslavia does not call for any comment.

As far as Belgium is concerned, the capture of the King did not create any serious constitutional problems. According to Article 82 of the Constitution of February 7, 1821,⁶ as amended, the cabinet of ministers have to assume supreme executive power if the King is unable to govern. True, the ministers are bound to convene the House of Representatives and the Senate and to leave it to the decision of the united legislative chambers to provide for a regency; but in view of the belligerent occupation it is impossible for the two houses to function. While this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.

In respect to Poland, the President of the Republic acting at the time of the invasion in September, 1939, Professor Ignacy Mościcki, resigned after the hostile army forced him to leave his capital. But before he crossed the frontier to Rumania he designated as his successor the present chief executive, Monsieur Wladyslaw Racziewicz. The nomination of the successor President was made by presidential decree on September 17, 1939, given at Kutx (Poland) in the exercise of the powers laid down in the Polish Constitution of April 23, 1935,⁷ and was duly published in the Polish Official Gazette.

⁴ See, for Belgium, the *Conseil Consultatif du Gouvernement* created on March 4, 1942 (*Moniteur Belge* (London), No. 5, 1942, at p. 82); for Czechoslovakia, the "State Council" as provided in the presidential decree published on July 21, 1940, in Czechoslovak Official Gazette, 1940, No. 1; and for Poland, the "Polish National Council" established on Dec. 9, 1939, as an advisory body of the President of the Republic and the government (Polish Official Gazette, No. 104, dated Dec. 11, 1939).

⁵ See the remarks made by the Minister of Luxembourg when presenting his credentials to the President on Nov. 8, 1940, III Dept. of State Bulletin, Nov. 9, 1940, p. 408.

⁶ Art. 82 translated into English reads: "If it is impossible for the King to govern, the ministers, after having established this impossibility, convene immediately the legislative bodies. The joint houses provide for the guardianship and the regency."

⁷ Art. 24 of the Constitution of April 23, 1935, provides: In case of a war the President has to designate his successor by special act published in the official journal of the government if

The present Prime Minister, General Sikorski, and the Ministers of his cabinet were appointed by the new President of the Republic, all in accordance with the constitution.⁸ Hence the continuity of the Polish Republic is preserved.⁹

The reconstitution of the Republic of Czechoslovakia encountered the most serious difficulties. Indeed the political situation was more complicated than that which President Masaryk had to face in 1917 and 1918.¹⁰ It is well known that as a result of the Munich agreement of September 29, 1938,¹¹ Dr. Edward Beneš had to resign as President of the Republic and his successor, Dr. Hacha, had to "consent to place the destiny of the Czech people and country with confidence" in the hands of the Fuehrer of the German Reich.¹² Czechoslovakia was dissolved into a Protectorate of Bohemia and Moravia¹³ and a State of Slovakia.¹⁴ However, not only the British Government protested against the changes effected in Czechoslovakia by German military action,¹⁵ but also the United States State Department refused to recognize any legal basis for the status announced by the German Reich according to the terms of the decree of March 16, 1939.¹⁶ Consistent with this policy, soon after the outbreak of the war on October 2, 1939, the Minister for

the presidency becomes vacant prior to the conclusion of the peace. The successor President remains in office until the expiration of three months after the conclusion of the peace. The decree nominating the new President was promulgated in the *Monitor Polski*, No. 214-217, published in Paris on Sept. 29, 1939.

⁸ Art. 12 of the Polish Constitution authorizes the President to appoint the Prime Minister and on the latter's recommendations the other ministers. See the exchange of notes between the Secretary of State, Cordell Hull, and the Ambassador of Poland, Count Jerzy Potocki, dated Sept. 30 and Oct. 2, 1939, and the statement by the Secretary of State, Oct. 2, 1939, that the "United States continues to regard the Government of Poland as in existence in accordance with the provisions of the Constitution of Poland."

⁹ See also IV Dept. of State Bull., March 6, 1941, p. 209 (presentation of credentials by the new Ambassador of Poland, Jean Ciechanowski).

¹⁰ See "*La position internationale de la Tchécoslovaquie*," by René Cassin, in *Czechoslovak Yearbook of International Law* (London), 1942, pp. 60, 62.

¹¹ Cf. "The Munich Settlement and International Law," by Quincy Wright, this JOURNAL, Vol. 33 (1939), pp. 12-31. The official text is published in *Reichsgesetzblatt*, Pt. II, 1938, p. 853.

¹² Declaration of March 15, 1939, signed in Berlin by Adolf Hitler and his Minister for Foreign Affairs, von Ribbentrop, as well as Dr. Hacha and his Minister for Foreign Affairs, Dr. Chvalkovsky, published in IX. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, No. 2 (July 1939), p. 506.

¹³ Cf. the decree of March 16, 1939, published in *Reichsgesetzblatt*, Pt. I, p. 485, by which the "Protectorate of Bohemia and Moravia" was constituted as belonging to the territory of the "Great German Reich" (*Gross Deutschland*).

¹⁴ The treaty signed in Vienna on March 18, 1939, and in Berlin on March 23, 1939, by which the "State of Slovakia placed itself under the protection of the German Reich" is published in *Reichsgesetzblatt*, Pt. II, p. 606.

¹⁵ Parliamentary Debates, House of Lords, Vol. 112, p. 312.

¹⁶ 20 Dept. of State Press Releases, 1939, No. 495, contains the text of a note from the Acting Secretary of State to the German Chargé d'affaires under date of March 20, 1939.

Czechoslovakia in Paris was authorized to form a Czechoslovak Army on French soil, and on December 20, 1939, the British Government recognized the Czechoslovak National Committee constituted under Dr. E. Beneš as being qualified to represent the Czechoslovak peoples.¹⁷ The next step was that the British Foreign Secretary agreed on July 21, 1940, to enter into relations with the "Provisional Czechoslovak Government" established by the Czechoslovak National Committee to function in England.¹⁸ Finally, on July 18, 1941, full recognition was accorded to the Czechoslovak Government and an envoy accredited to Dr. Beneš as President of the Republic.¹⁹ The Department of State, while recognizing Czechoslovakia, accords its government a "provisional" character as evidence in the Mutual Aid Agreement concluded July 11, 1942.²⁰ The attribute "provisional" seems to indicate that the recognition by the United States Government is not absolute and irrevocable. This qualification may be due to the fact that, unlike the other sovereignties-in-exile, the Czechoslovakian Government was not constituted with the approval of its national assembly, the Chamber of Deputies and the Senate.²¹ However this may be, this government enjoys the same privileges as the other governments in London. Thus Anthony Drexel Biddle, Jr., is American Ambassador in London to the four countries of Belgium, The Netherlands, Norway and Poland, and Minister to the three countries of Czechoslovakia, Greece and Yugoslavia.²² No doubt it is a unique event in diplomatic history that an envoy has been accredited simultaneously to seven nations.

The recognition of the governments in London after the invasion of their countries in Europe is clearly in accord with the old and well established principle of international law that belligerent occupation does not affect the sovereignty of the occupied state. The occupying Power is not successor to the lawful sovereign in the occupied territory but is a government based on force exercised as a war measure.²³ To refuse such recognition would also be contrary to the spirit of the Covenant of the League of Nations and to the principles of the Briand-Kellogg Pact that war is outlawed as an instrument

¹⁷ Parl. Deb., H. L., Vol. 356, p. 552.

¹⁸ Parl. Deb., House of Commons, Vol. 363, p. 614.

¹⁹ Parl. Deb., H. C., Vol. 373, p. 861.

²⁰ The full text of this agreement is in VI Dept. of State Bull., July 11, 1942, p. 607.

²¹ The question of "provisionality" is discussed in the Czechoslovak Yearbook of International Law (1942), p. 184.

²² VI Dept. of State Bull., May 16, 1942, p. 440.

²³ Art. 43 of the Hague Convention of 1907 (Laws and Customs of War on Land) and Wilson, Handbook of International Law (3d ed., 1939), p. 309. This view was also recognized by the German Supreme Court at Leipzig which held during the first World War on July 26, 1915: "Through hostile occupation of enemy country no change in state boundaries or in state sovereignty legally occurs, and the territory in question is in no way acquired by the state through whose troops it was conquered. (*Ponies Juris Gentium*, Ser. A, Sec. II, Vol. I, p. 486.)

of national policy and that neither military violence nor conquest is lawful title for acquiring territory.

FREE FRENCH (now called) FIGHTING FRENCH

France, once a mighty centralized republic ruling over a great empire, is now unhappily disunited, partly defeated and partly continuing the fight on the side of the United Nations. It is divided up into five different sections. There is, first, that part of metropolitan France which is occupied by Germany and administered by a military government with its headquarters at Paris; then the French Government at Vichy exercising its "power" in agreement with Germany over the unoccupied part of France and parts of the empire, in particular French North Africa.²⁴ Martinique is under a High Commissioner who maintains a rather independent régime and with whom the State Department is negotiating directly.²⁵ One island, Madagascar,²⁶ is occupied by Great Britain but "held in trust for France." The "Fighting French" at London, headed by General de Gaulle, are in effective control of vast territories scattered over three continents with an area almost six times as big as metropolitan France and having more than seven million inhabitants, i.e., Equatorial Africa and the mandated territories of the Cameroons, French India, New Caledonia and its dependencies, the New Hebrides and the French possessions in Oceania, as well as St. Pierre and Miquelon in the Atlantic. To complete this colorful picture it may be added that the French mandate for Syria and Lebanon has been terminated. Syria declared its independence at Damascus on September 27, 1941, and Lebanon issued a similar proclamation at Beirut on November 26, 1941,²⁷ but the American Government, although sympathizing with "the natural and legitimate aspirations of the peoples of Syria and Lebanon," refrained from according its formal recognition to these countries and regards the convention signed with France on April 4, 1924, as continuing in effect.²⁸

General de Gaulle does not head a government but is recognized by the British Government "as leader of all free Frenchmen wherever they may be."²⁹ He represents the French authority competent to maintain naval,

²⁴ For the purpose of the Trading with the Enemy Act, 1939, England treats the whole of metropolitan France, including Corsica, Algeria, the French Zone of Morocco and Tunisia as enemy territory. (S. R. & O., 1940, No. 1092.)

²⁵ See announcement by the State Department under date of May 9, 1942, in VI Dept. of State Bull., May 9, 1942, pp. 391, 392.

²⁶ Cf. statement under date of May 4, 1942 (Dept. of State Bull., *ibid.*, p. 391.)

²⁷ See the proclamations by General Catroux recognizing in the name of the Fighting French the independence of Syria under the Cheikh Taggeddine el Hassani, Sept. 28, 1941, and of Lebanon under the President Naccaché, Nov. 26, 1941, both in *Journal Officiel de la France Libre*, Dec. 9, 1941, pp. 51, 52.

²⁸ Announcement concerning the question of recognition of Syrian and Lebanese independence, in V Dept. of State Bull., Nov. 29, 1941, p. 440.

²⁹ Eden on Sept. 10, 1941, in 374 Parl. Deb., H. C. (1940-1941), p. 159.

military and air forces for service in association with British forces. The basic charter for the organization, employment and conditions of service of the "French Volunteer Force" is the memorandum of agreement as of July 1, 1940, annexed to the exchange of letters between the British Prime Minister and de Gaulle under date of August 7, 1940.³⁰ This charter, including the covering letter, gives clear expression to the following principles. It is the determination of the British Government "when victory has been gained by the Allied arms, to secure the full restoration of the independence and greatness of France."³¹ Furthermore, the British Government promises to use its best endeavors, "at the time of the conclusion of the peace, to help the French volunteers to regain any rights, including national status, of which they may have been deprived as a result of their participation in the struggle against the common enemies."³² This is of substantial interest since, according to an act issued by "*Pétain, Maréchal de France, Chef de l'État*," every Frenchman who left the French metropolitan territory between May 10, 1940 (the date of the beginning of the big offensive on the west), and June 30, 1940 (the fifth day after the signing of the German-French Armistice), "without regular instructions issued by the competent authority or without a legitimate motive, will be considered as having intended to escape his obligations and duties towards the national community and consequently as having renounced French nationality."³³ The expatriation is effected as a result of special decrees based on reports submitted by the Ministry of Justice, and may include women and children. Simultaneously with denaturalization, the property of the person concerned is seized and may be liquidated.³⁴

The maintenance of the national character of the Fighting French force is guaranteed as far as possible with respect to discipline, language, promotion and duties.³⁵ More significant is the undertaking of the British Government that the vessels of the French fleet commissioned and operated by Frenchmen will remain French property.³⁶ In a military respect it is interesting to note that "the force will never be required to take up arms against France"³⁷ and that General de Gaulle's position is defined as being "in supreme command" of the French force but under "the general direction of the British High Command."³⁸

³⁰ Great Britain, Treaty Series, France No. 2, 1940, Cmd. 6220.

³¹ Letter from the British Prime Minister to de Gaulle, Aug. 7, 1940, *ibid.*

³² Par. 6, Art. III, Memorandum of Agreement, *supra*, note 30.

³³ Art. I of the *Act relative à la déchéance de la nationalité française* in *Journal Officiel* published at Vichy, July 24, 1940.

³⁴ *Ibid.*, Art. II.

³⁵ Par. 1, Art. II, Memorandum of Agreement, *supra*, note 30.

³⁶ *Ibid.*, par. 4 (f), Art. II.

³⁷ *Ibid.*, par. 2, Art. I.

³⁸ *Ibid.*, par. 6, Art. II. For the coördination of the military forces on land, on the sea and in the air, de Gaulle has created a Chief-Military-Committee (*Haut-Comité Militaire*). See decree dated Sept. 24, 1941, in *Journal Officiel*, Oct. 14, 1941, p. 43.

De Gaulle has also established a French National Committee over which he presides.³⁹ Concerning its recognition, Mr. Eden made the statement that it is regarded as

representing all Free Frenchmen wherever they may be, who rally to the Free French Movement in support of the Allied Cause and that the British Government will treat with the National Committee on all questions involving their collaboration with the Free French Movement and with the French Overseas territories which place themselves under their authority. This seems to His Majesty's Government to be the appropriate character in which to regard the executive organ of a movement which, under the fighting leadership of General de Gaulle, embodies the hope of Frenchmen of free mind, wherever they may be.⁴⁰

The United States State Department has likewise recognized the French National Committee in London as being in effective control of French Equatorial Africa and the French Cameroons. In view thereof an American Consulate General was established at Brazzaville. For the same reason an American Vice-Consulate functions at Nouméa in New Caledonia.⁴¹ Moreover, the "Fighting French" qualify for Lend-Lease aid. On November 11, 1941, the President determined "that the defense of any French territory under the control of the French Volunteer Forces (Free French) is vital to the defense of the United States."⁴² For the purpose of making the cooperation between the United States Government and the French National Committee more effective, Admiral H. R. Stark and Brigadier General C. L. Bolte were appointed to consult with the Fighting French in London. On the occasion of this very significant appointment the State Department recognized the French Committee as being "a symbol of French resistance in general against the Axis powers" but also admitted that in the last analysis "the destiny and political organization of France must be determined by free expression of the French people under conditions giving them freedom to express their desires unswayed by any form of coercion."⁴³

In addition to the French National Committee, de Gaulle has formed the Council for the Defense of the Empire, which, from its headquarters at London, deals with the High Commissioners and Governors General in charge of the colonies.⁴⁴

³⁹ This committee consists of eight *commissaires nationaux* of Economics, Finance and Colonies, Foreign Affairs, War, Navy, Justice and Education as well as Interior. See Ordinance No. 16, Sept. 24, 1941, and decree of the same date, *Journal Officiel*, Oct. 14, 1941, No. 11.

⁴⁰ Nov. 26, 1941, in 376 Parl. Deb., H. C., p. 727.

⁴¹ VI Dept. of State Bull., March 7, 1942, p. 208, and April 4, 1942, p. 273.

⁴² V Dept. of State Bull., Dec. 27, 1941, p. 589.

⁴³ VII Dept. of State Bull., July 11, 1942, p. 613.

⁴⁴ Art. II of the first ordinance issued by de Gaulle, *Chef des Français Libres*, in the name of the French people and the French Empire, at Brazzaville, Oct. 27, 1940, published in *Journal Officiel*, London, Jan. 20, 1941, No. 7, p. 3, and Art. 10 of Ordinance No. 16, Sept. 24, 1941, in *Journal Officiel*, No. 2, p. 41.

INTERNATIONAL LAW ASPECT OF RECOGNITION

Recognition as a belligerent Power of armies fighting to free their nation from subjection has precedents in history and should be clearly differentiated from recognition of insurgents. During the last war, on September 3, 1918, the United States of America, Great Britain, France and Italy recognized the Czechoslovaks' National Council as a *de facto* belligerent government endowed with proper authority to direct the military and political affairs of the Czechoslovaks, although the territory of the new state was at the time under the actual control of Austria-Hungary.⁴⁵

Another instructive precedent is Poland, which in the last war was recognized in successive stages. First the Polish National Committee was constituted by Dmowski in Paris, with I. J. Paderewski as the well known delegate in Washington, D. C. Then followed on June 4, 1917, the formation of the Polish National Army authorized by a decree of Poincaré, President of France, and finally the Polish State as one of the "Allied and Associated Powers" became a party to the Treaties of Versailles, St. Germain, Neuilly, Trianon and Sèvres, as a result of which its territorial boundaries were clearly defined. But the constitution of Poland was not signed until March 17, 1921.⁴⁶

The enemy is not compelled to grant recognition to armed forces recognized as a belligerent Power by the other side. But it would be a clear violation of international law if the Free French troops captured by the Axis Powers were treated as *franc tireurs*. True, the French-German Armistice Agreement signed on June 22, 1940, imposes, in its Article X, the obligation on the "French Government" to forbid its "nationals" to fight in armies at war with the Axis. But in view of the above mentioned expatriation decree of July 23, 1940, it is doubtful whether the Free French are nationals of the French Government at Vichy. What is more important, the armistice agreement cannot overrule the time-honored principles of international law. The Free French are fighting under a united command, have a distinctive emblem recognizable at a distance, carry arms openly, conduct their operations in accordance with the rules of civilized warfare and observe the principles of humanity and chivalry. Hence they comply in every respect with the qualifications of belligerents according to the Hague Convention of 1907 regarding the Laws and Customs of War on Land.⁴⁷

⁴⁵ See, on the recognition of the Czechoslovaks, Fenwick, *International Law* (2d ed., 1924), p. 110; Garner, *International Law and the World War* (1920), Sec. 26, p. 39; C. C. Hyde, this JOURNAL, Vol. 13 (1919), p. 93; Hackworth, *Digest of International Law*, Vol. I (1940), Sec. 39, pp. 203-208; Hobza in *Revue Générale de Droit International Public*, XXIX (1922), pp. 387, 388; Buza in *Zeitschrift für Völkerrecht*, XIII (1924), pp. 114, 115.

⁴⁶ See with respect to foregoing: Hackworth, *op. cit.*, Sec. 14, pp. 214-217; Blociszewski in *Revue Générale de Droit International*, XXVIII (1921), pp. 5-70; and Twardowski in Strupp *Wörterbuch des Völkerrechts und der Diplomatie*, Vol. II, pp. 280-283.

⁴⁷ Cf. the definition in Art. 1, Chap. I, Sec. I, of "The Hague Regulations." The texts of the Convention and Regulations are printed in *United States Treaties*, Vol. 2, and in this JOURNAL, Supplement, Vol. 2 (1908), pp. 90, 97.

The recognition of the Free French as a belligerent Power is a purely political question. The legal status of the "Fighting French" is not dependent on the legality of the Pétain régime.⁴⁸ Whether the Vichy Government is both illegal and illegitimate, whether it usurped its power by a *coup d'état* and whether it enjoys sovereignty—all this seems rather immaterial for the determination of the status of the French supporting de Gaulle.⁴⁹ Today the "Free French" fight in alliance with the forces of the United Nations, and the National Committee is a non-sovereign authority which, as will be seen later, enjoys in England most of the rights and the privileges to which the exiled governments are entitled. Although not recognized *de jure*, de Gaulle and his National Committee together with the Council of Defense of the French Empire constitute *de facto* a governmental institution.

DIPLOMATIC STATUS

On March 6, 1941, the British Parliament accorded diplomatic immunity and privileges to the members of sovereign allied governments established in the United Kingdom and their official staff as well as to envoys accredited to them.⁵⁰ This statute does not, however, include the "Heads of States" as it is generally admitted that they enjoy extraterritoriality. This is recognized by the British courts. By passing this Act, Parliament expressly conferred upon the governments-in-exile "the independent and dignified status to which their position and sovereign power entitles them."⁵¹ But apart from this political consideration, the Act offers the practical advantage of defining precisely the persons designed to benefit therefrom. Officials qualify under the statute only if they are recognized by the British Government as performing duties no less responsible than diplomatic secretaries. The statutory privilege involves not only immunity from criminal and civil jurisdiction, but also freedom from taxation by British authorities and from registration as an allied national under the orders of the Minister of Labor and National Service. The exiled governments are receiving and sending envoys from and to the countries with which they maintain relations. The Act expressly extends the privileges to such envoys who, as in case of the Czechoslovakian provisional government, are termed "diplomatic representatives." This distinction has, however, no legal significance. General de Gaulle and the members of his committee as a foreign non-sovereign authority enjoy also the diplomatic privileges which according to law, custom and usage are accorded to governments.⁵² The Free French authority maintains

⁴⁸ See the *Manifeste* of Oct. 27, 1940, and the *Declaration Organique* on Nov. 16, 1940 (*Journal Officiel* (London), No. 1, Jan. 20, 1941, pp. 3, 4).

⁴⁹ A very good discussion of the subject is the article "Vichy or Free France?" by René Cassin in 20 *Foreign Affairs* (1941), p. 102.

⁵⁰ Diplomatic Privileges (Extension) Act, 1941, 4 & 5 Geo. 6, Ch. 7.

⁵¹ Statement by the Under Secretary of State for Foreign Affairs when introducing the Bill (369 *Parl. Deb.*, H. C., 1940-1941, p. 329).

⁵² *Par. b*, Sec. 1 of Diplomatic Privileges (Extension) Act, 1941, *supra*, note 50.

"delegates" abroad, *e.g.*, in the United States of America, and the representatives of foreign Powers are accredited to *Chef des Français Président du Comité National*.⁵³

TREATY-MAKING POWER—FOREIGN POLICY

The governments-in-exile are displaying a rather intensive political activity. They have concluded treaties among themselves and with third countries. Each of them has signed a military agreement with the British Government. In addition the Czechoslovakian and Polish Governments concluded on November 11, 1940, an agreement of "Confederation of States,"⁵⁴ in execution of which a joint declaration was signed in London on January 25, 1942, defining the principles of the projected confederation. Furthermore, Greece and Yugoslavia on January 15, 1942, entered at London into a pact for a Balkan Union.⁵⁵ Moreover, Czechoslovakia and Poland executed on July 18 and September 28, 1941, and July 30 and August 15, 1941, respectively, treaties with Russia pledging aid to the latter country and making arrangements for Czech and Polish army units on Russian soil.⁵⁶

The American Government entered into treaty relations with the exiled government not only by extending "Lease-Lend" privileges to them but also by signing far-reaching declarations and agreements. The joint undertaking not to make a separate armistice or peace with the enemies was executed at Washington on January 1, 1942, by all the United Nations.⁵⁷ Of still greater significance are the "Mutual Aid Agreements" by which the signatory Powers pledge not only their mutual resources to a common victory but also their collaboration in economic policies to make possible a lasting peace. Substantially identical agreements were signed by the United States with Great Britain, the Union of Soviet Socialist Republics as well as China, and with the exiled governments of Belgium, Czechoslovakia, Greece, The Netherlands, Norway and Poland.⁵⁸ It may be added that most of the governments-in-exile have declared war on Japan.

All exiled governments, including the Fighting French, have formed, together with Great Britain, the Dominions and Russia, the "Inter-Allied Council." One of its most significant actions so far has been to adhere to

⁵³ Art. 6, Ordinance No. 16, in *Journal Officiel* (London), No. 11 (Oct. 14, 1941).

⁵⁴ The wording of the Polish-Czechoslovak Agreement of Confederation is published in 2 *Inter-Allied Review*, 1942, pp. 26, 27.

⁵⁵ For the text of the constitution of the Balkan Union, see 2 *ibid.*, pp. 25-26.

⁵⁶ The U.S.S.R. has granted the Polish armed forces full rights of an independent National Polish Army. V Dept. of State Bull., Oct. 11, 1941, p. 45.

⁵⁷ This JOURNAL, Supplement, Vol. 36 (1942), p. 191; VI Dept. of State Bull., Jan. 3, 1942, pp. 3-4.

⁵⁸ The Mutual Aid Agreements with China, June 2, 1942, Great Britain, Feb. 23, 1942, and the U.S.S.R., June 11, 1942, are printed in this JOURNAL, Supplement, Vol. 36 (1942), pp. 165, 170, 187. They are also printed, with similar agreements with the governments-in-exile, in the current issues of the Dept. of State Bulletin.

the "Atlantic Charter" at its meeting held in London on September 24, 1941.⁵⁹

LEGISLATIVE POWER

The exercise of legislative powers by the allied sovereign governments in England raises problems in constitutional and international law.

(a) *Constitutional Aspect.*⁶⁰ There are mainly two questions which require an answer:

- First: Is the government entitled to legislate although the proper legislative bodies remained in the occupied country and cannot function?
- Second: Can a government issue valid decrees on foreign soil?

Each government had to solve these legal difficulties in its own way within the framework of its constitution.

1. Greece did not have to consider any constitutional problems. The parliamentary system had been suspended since 1935 when General Metaxas took over the government under the King of the Greeks.⁶¹

2. Poland is the country which has given its head very extensive legislative powers. The constitution of April 23, 1935, accords the same force to ordinary statutes approved by the two houses of parliament (the *Diete* and the Senate) and to decrees issued by the President, both having the force of law.⁶² In peacetime the President has, subject to authority delegated by parliament the right to issue decrees on most subjects except amendments of the constitution. Whenever parliament is dissolved and a new parliament not yet elected he may legislate on all topics except questions concerning budget, finances, election laws and constitutional changes.⁶³ But his powers are almost unlimited during wartime. Without authorization by parliament the decrees by the President can cover any field except to change the constitution.⁶⁴ Under the circumstances, the President is not restricted by the constitution in his legislative activity. Questions as to the validity of his decrees published in *Dziennik Ustaw*, the official journal of laws of Poland, can hardly arise.

3. The Government of Norway carefully paved the way for its legislation abroad. Before the King and his government left Norwegian territory the Storting was convened and gave in its meeting at Elverum on April 9, 1940, "the widest authority to take the decisions and resolutions which are necessary in respect of the protection of the interests of the kingdom until the

⁵⁹ V Dept. of State Bull., Sept. 27, 1941, p. 233.

⁶⁰ The best discussion of this new problem will be found in an article by Arnold D. McNair, "Municipal Effects of Belligerent Occupation," 57 *Law Quarterly Review*, 1941, pp. 33, 67; see also "The Legislation of the Allied Powers in the United Kingdom," by Alfred Drucker, in *Czechoslovak Yearbook of International Law* (London), 1942, p. 45.

⁶¹ The Greek Parliament was dissolved on August 4, 1936. (See *Political Handbook of the World*, New York, 1942, p. 91.)

⁶² Art. 49 of the Polish Constitution.

⁶³ *Ibid.*, Art. 55.

⁶⁴ *Ibid.*, par. 2, Art. 79.

Storting can again be summoned to a fresh meeting." After having voted unanimously in favor of this authority, all the members attending the meeting approved of the resolution proposed by President Hambro that "it is of the greatest importance to maintain the lawful Norwegian Government even if it has to be exercised from a place outside the frontiers of the country. The King, the Crown Prince and the Government must not under any consideration fall into the hands of the enemy."⁶⁵ This resolution was important because, according to the constitution "the King forfeits for his person his rights to the Crown if he stays outside the Kingdom for more than six months at a time *without* the consent of the Storting."⁶⁶ A delegation of legislative powers by the Storting to the King was not necessary since the constitution expressly authorizes the King to enact emergency legislation, which has to be submitted to parliament at its next session;⁶⁷ but as long as the Storting cannot meet, such decrees have the force of law. Indeed the legislative decrees of the Royal Norwegian Government in London are termed "provisional," indicating that when the country is liberated the people of Norway will be called upon to ratify or cancel whatever legislative enactments had been introduced by their government in exile.

4. Belgium is in the very exceptional position of being able to rely on the authority of its Supreme Court for the proposition that decrees issued without parliament by the executive power are valid if, as a result of hostile invasion, the legislative bodies cannot function. The constitutional legality of the royal decrees issued by the King and his government during the occupation of his country by Germany from 1914 to 1918 were upheld by the Belgian *Cour de Cassation*.⁶⁸ The Belgian Supreme Court of Justice based the decisions on the broad principles that: (1) belligerent occupation does not suspend or destroy the sovereignty of the occupied state (see Art. 43 of the Hague Convention of 1907 respecting the Laws and Customs of War on Land);⁶⁹ (2) no nation can live without a sovereign government; (3) the legislative power is indispensable for the existence of a government. The tribunal concluded therefrom that since the Chamber of Deputies and the Senate were paralyzed, the legislative power is vested in the King alone.⁷⁰ True, there is this difference between the conditions which prevailed during

⁶⁵ Documents on International Affairs (Norway and the War, September 1939-December 1940), edited by M. Curtis and issued under the auspices of the Royal Institute of International Affairs (1941), p. 128.

⁶⁶ Art. 11 of the Norwegian Constitution. See the official English translation issued by the Minister of Justice in Oslo (1937).

⁶⁷ *Ibid.*, Art. 17.

⁶⁸ See the judgments of the Cour de Cassation of Feb. 11 and June 4, 1919, Feb. 18 and April 27, 1920, published in *Pasicrisie Belge*, 1919, Pt. I, pp. 9-16, 97-110, and 1920, Pt. I, pp. 62 and 124-125.

⁶⁹ See, *supra*, note 23.

⁷⁰ According to Art. 26 of the Belgian Constitution the legislative power is exercised jointly by "le Roi", "la Chambre des Représentants" and "le Sénat," and according to Art 27, each one of the three legislative branches has the right to introduce new legislative bills.

the first World War and today, that now also the King is in the occupied territory and the government alone functions abroad. But the constitution provides for the contingency that the King cannot govern. In this case the ministers have to convene the legislative bodies, which jointly are competent to devise means for replacing the King for the duration of such a contingency.⁷¹ Yet as long as the Chamber and the Senate cannot meet and have not adopted a joint resolution, the Belgian Cabinet can exercise the rights and prerogatives of the King. It is of interest to note in this respect that, similar to the action of the Norwegian Storting at its meeting at Hamar and afterwards at Elverum on April 9, 1940,⁷² the Belgian Parliament gave the King on September 7, 1939, extraordinary powers to take care of any emergency.⁷³ Hence the Belgian Government keeps clearly within the framework of its constitution as interpreted by the *Cour de Cassation* at Brussels, if the Council of Ministers (*Ministres réunis en Conseil*) exercises legislative powers in England in the name of the Belgian people. In the preamble to the recent Belgian decrees any reference to the powers of the King is dropped and only the impossibility of convening the legislative bodies is emphasized.⁷⁴ But it is not believed that the fact that the King is no longer mentioned in the Belgian decrees in London is intended to have any legal significance.

5. Like Belgium, Luxembourg, a neutral state, suffered in both wars in 1914 and in 1940 the fate of being invaded. The people of the Grand Duchy showed very special foresight. As far back as September 28, 1938, the legislative chamber voted more extensive power for the government. On August 27, 1939, the Grand Duchess issued a proclamation that Europe was in an "alarming condition" and on August 29, 1939, a statute was passed authorizing the government to issue legislative decrees without parliament in case of the outbreak of a war in Europe.⁷⁵

6. In Yugoslavia the constitution of September 3, 1931, vests in the King supreme authority. He is the "guardian of the national unity and of the integrity of the State" (Art. 29); he approves of and promulgates the laws, he convenes and dissolves parliament (Art. 32). In case of a war he has express power to "adopt all measures absolutely necessary for the Kingdom,

⁷¹ Art. 82 of the Belgian Constitution.

⁷² See the broadcast speech of Dr. Nygaarsvold, Prime Minister of Norway, June 25, 1940, published in Documents on International Affairs, *supra*, note 65, pp. 127, 128.

⁷³ Art. 1 of the *Loi donnant au Roi des pouvoirs extraordinaires (Moniteur Belge)*, Brussels, Sept. 8, 1939. See the very interesting report by the special committee of the Chamber and the Senate discussing this statute in *Pasinomie*, 1939, pp. 473-476.

⁷⁴ Cf. the *Moniteur Belge* (London), Jan. 16, 1940, No. 1 and the following numbers.

⁷⁵ See the *Pasinomie Luxembourgeoise* for 1937-1940 containing the Act of Sept. 28, 1938, p. 465, the proclamation of Aug. 27, 1939, p. 698, and the Act of Aug. 29, 1939, p. 701; the Grand Ducal decrees of April 22, 1941, issued by the Grand Duchess and her government at Montreal refer as source of the legislative power not only to the Acts of 1938 and 1939 mentioned above, but also to an old Act of Jan. 16, 1866. The reason is that, according to Art. 27 of this Act, the State Council need not be consulted in cases of emergency.

irrespective of any legal or constitutional provisions." But such exceptional measures have to be submitted later to parliament. Hence for the duration of the war all legislative powers are exercised by the King alone. The present King is of age, and the regency has thus come to an end.⁷⁶ His royal decrees are published in the official gazette in London (formerly Belgrade) without any reference to any article in the constitution.

7. The constitution of Czechoslovakia of February 29, 1920, does not provide for the emergency that parliament cannot meet. That is why the President of the Republic issued on October 15, 1940, a "Constitutional Decree" regarding the temporary exercise of legislative power.⁷⁷ This decree states that so long as parliament cannot function the President will exercise its powers with the approval of the government whenever according to the constitution consent of the National Assembly would have been required. Thus the President of the Czechoslovak Republic has by decree substituted the approval of the government for that of the National Assembly. No doubt this is a constitutional amendment *praeter legem*, an "act of original, revolutionary, creative legislation."⁷⁸ A second presidential decree of October 26, 1940, deals with the promulgation of the laws of the Czechoslovak Republic.⁷⁹ It is, however, submitted that such constitutional decrees supplementing or amending the constitution without complying with the provisions dealing with constitutional changes⁸⁰ are of doubtful value. If the constitution did not give the President the power to legislate with or without the government, he cannot acquire such rights by virtue of his own decree.

8. The Queen of The Netherlands and her government followed a different course. The invasion of the kingdom in Europe was so sudden and overwhelming that no time was left to consider or to fulfill constitutional technicalities. In view of such extreme emergency, a temporary deviation from the wording of the constitution is justifiable if this is necessary to conserve the sovereignty and independence of the country. It is significant that the King's Bench Division of the High Court of Justice in England, in the *Amand Case*,⁸¹ held unanimously with regard to the Netherlands constitution, that there was "in Netherland law an inherent power in the Netherlands governing bodies, or such of them as survive to make and execute acts of state legislation, which have the force of law during a time of emergency." The Royal decrees (*Koninklijk Besluit*) are issued by the Queen in London

⁷⁶ According to Art. 35 of the constitution of the Kingdom of Yugoslavia, the King becomes of age at 18.

⁷⁷ Czechoslovak Official Gazette, 1940, No. 2.

⁷⁸ See, with regard to foregoing, the note on "The Constitutional Position of the Czechoslovak President in Exile," by E. Schwelb, in *Czechoslovak Yearbook of International Law* (London), 1942, p. 180.

⁷⁹ Czechoslovak Official Gazette (1940), No. 4.

⁸⁰ Arts. 33 and 42 of the *Charte constitutionnelle de la République Tchécoslovaque*.

⁸¹ (1942) 1 All E. R. 236, 250.

upon the presentation of the competent Minister and published in *Staatsblad van het Koninkrijk Nederlanden* in England, but no article of the constitution as source of the powers of the Queen is mentioned.

9. It is not believed that this power of the executive to enact crisis legislation for the duration of the emergency, subject to ratification or revocation by parliament at its next meeting to be convened at the end of the emergency, is peculiar to Netherlands law. It is rather believed to be a more general constitutional principle. If there is a written charter and its authors did not have the foresight to legislate for an eventuality, a sound judge called upon to interpret the constitution will have to reply to the questions: Is it in the interest of the people, whom the constitution is supposed to protect, that the government does not legislate for the defense of the country, because the proper legislative body is in enemy control and the invader did not allow sufficient time to amend the constitution authorizing its government to legislate abroad? Or would the fathers of the constitution, had they anticipated at the time of drafting it the possibility of an occupation of the country—or would the people *today* if they were free to express an opinion, have refused legislative powers to the sovereign government for the duration of such emergency and within the limits dictated by state necessity? The answer cannot be doubtful. This method of interpretation coincides with the instructions laid down in the Swiss Code. The Swiss lawyer is bound "to apply the law in all cases which come within the letter or spirit of any of its provisions, and where no provision applies, the judge shall be guided according to the existing customary law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator."⁸²

The doctrine of implied constitutional power differs materially from the English system in particular where the executive, having transgressed its powers in the interest of the country, seeks ratification by parliament. A good example of such invalid legislation by means of a prerogative proclamation occurred in 1766 when the King, acting on advice of his minister, laid an embargo on all ships laden with wheat and flour, and the ministers were eventually indemnified by Parliament. With regard to this so-called indemnity legislation, Dicey makes the following forcible statement:

There are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. The course which the government must then take is clear. The Ministry must break the law and trust for protection to an Act of Indemnity. Such a statute legalizes illegality.⁸³

10. The temporary removal of the seat of the exiled government should, in the absence of express provisions in the constitution, not limit the exercise of the rights of sovereignty. It is not conceivable that sovereignties

⁸² Art. 1 of the Swiss Civil Code.

⁸³ Dicey, Introduction to the study of the Law of the Constitution (9th ed. by E. C. S. Wade, 1941), pp. 412, 413.

recognized by the English Crown should be prevented from doing in London what they could do if they were in their own countries. This issue was decided in October, 1927, by the Court of Appeal of Rome. In *Re Sarsini* and others, the tribunal considered the validity of acts of the Government of Montenegro, which took refuge on Italian soil as a result of the belligerent occupation of its territory in 1921 by Yugoslav troops. It held that

a state may exist outside its natural boundaries and still preserve the character of a person in public international law in its relations with other states and particularly in its relations with the state whose hospitality it enjoys. The Government of such a state, however, must be enjoying full and formal recognition.⁸⁴

Such recognition was denied by the Italian Crown to the Government of Montenegro. But the English sovereign recognizes the "Netherlands Queen and her government as *exclusively* competent to perform the *legislative* and administrative and other functions appertaining to the Sovereign and Government of the Netherlands."⁸⁵ Therefore, Mr. Justice Wrottesley rightly concluded that "so far as His Majesty's Government is concerned, there is no flaw in the title of the Queen to do here what appertains to the Sovereign and Government of the Netherlands. . . ." ⁸⁶

With respect to the Norwegian Government in London, the King's Bench Division of the High Court of Justice declared that, according to a letter by the Foreign Office dated May 18, 1940, it is recognized as "the *de jure* government of the entire Kingdom of Norway and that no other government is recognized either *de jure* or *de facto* of Norway or any part thereof."⁸⁷ Although no decisions concerning the other governments-in-exile are known, it can be safely assumed that the recognition accorded to them by the British Government and their powers are comparable to those vested in the Netherlands and Norwegian sovereignties.

11. Finally, it should be added that in his Ordinance No. 16 General de Gaulle prescribes the conditions for the exercise of legislative powers by the *Comité National*. All acts of a legislative nature have to be signed and promulgated by the *Chef des Français libres* and the President of the National Committee, and countersigned as well as certified by one or more of the "National Commissars" who are members of the committee. But such ordinances have to be submitted for ratification by the national representatives of the French people.⁸⁸

(b) *International and English Municipal Law*. Wheaton emphasizes that "every nation possesses and exercises exclusive sovereignty and juris-

⁸⁴ Annual Digest of Public International Law Cases, 1927-1928, No. 106, pp. 166, 167.

⁸⁵ See the statement made by the Attorney General of England in the *Amand* case (1942), 1 All E. R. 236, 240.

⁸⁶ *Amand* case, *supra*, p. 240.

⁸⁷ *Lorentzen v. Lyddon & Co. Ltd.* (Dec. 2, 1941), 71 Lloyd's List Law Reports (1942), pp. 197, 204.

⁸⁸ Par. 2, Art. 3, Ordinance 16 (*Journal Officiel*, London), Oct. 14, 1941, p. 41.

diction throughout the full extent of its territory."⁸⁹ Obviously no foreign sovereign can act on British soil against the consent of the English Crown and Parliament. But the exiled governments had been invited to establish themselves in England. Moreover, the governments-in-exile legislate on British soil exclusively for their own subjects without attempting to enforce their decrees. They recognize that the legislative enactments of the territorial sovereign always prevail over those of the personal sovereign. There is, therefore, in fact no rivalry of conflicting legislative bodies. The British Parliament is supreme. It may impose legal limitations upon itself but can also remove them by a subsequent act.⁹⁰

LEGISLATIVE ACTIVITY

The governments-in-exile have exercised extensive legislative functions. The decrees are published in London in the official gazettes⁹¹ which had always been the organs for the legal announcement of statutes, ordinances and other departmental publications. A survey of these gazettes gives an interesting picture of the variety of topics covered by the exiled governments. Space does not allow an exhaustive analysis; a few examples will suffice. The decrees deal among other subjects with economic warfare, finance, the army, and jurisdiction.

In the interest of protecting assets situated abroad and belonging to nationals of exiled governments against seizure by the enemy, and for the purpose of preventing the enemy and persons in the occupied territories from deriving any benefit from abroad, the following measures have been enacted:⁹²

⁸⁹ Elements of International Law (6th ed. by A. B. Keith, 1929), Vol. I, p. 205.

⁹⁰ Attorney General for New South Wales v. Trethaven, [1932] A. C. 526; Jennings, The Law and the Constitution (2d ed., 1938), p. 143.

⁹¹ The names of the gazettes are as follows:

Belgium: *Moniteur Belge*, issued first in Paris from May 18-May 30, 1940, and from Nov. 22, 1940, in London.

Czechoslovakia: *Uredni Vestnik Ceskoslovensky*, issued since Jan. 1, 1940, in London.

Luxembourg: *Memorial*, first issued on Feb. 1, 1941, in Montreal.

The Netherlands: *Nederlandsche Staatscourant*, issued since May 24, 1940, and *Staatsblad van het Koninkrijk Nederlanden*, issued in London since April 1, 1940.

Norway: *Norsk Lovtidend*, issued since Aug. 15, 1940, in England, and *Norsk Tidend*, issued since Aug. 30, 1940.

Poland: *Dziennik Ustaw*, issued in London since Jan. 21, 1941. *Moniteur Polski* ceased publication on May 20, 1940.

Yugoslavia: *Sluzbene Novine Kraljevine Jugoslavije*, issued formerly in Belgrade, now London.

Fighting France: *Journal Officiel de la France Libre*, No. 1, appeared on Jan. 20, 1941.

The foregoing list is extracted from the Memoranda Series No. 3 (Jan. 15, 1942) of the Carnegie Endowment for International Peace Library, Washington, D. C., compiled by the Librarian, Miss H. L. Scanlon.

⁹² See in general the memorandum by The Netherlands Government enclosed in a note to the State Department under date of March 5, 1942, and dealing with actions taken by the

(a) The Belgian and Netherlands Governments have authorized such of the directors, managers and executive officers of companies organized and carrying on business in the occupied territory as had managed to escape, to transfer the domicile and management of such companies to a place outside the occupied territories.⁹³

(b) The Netherlands decree of June 7, 1940, declares it unlawful to represent abroad, without a *special* license, companies existing in territory which is occupied, and individuals residing therein. Any powers issued by such companies and individuals are null and void.⁹⁴

(c) The rights of shareholders of companies existing in occupied territory are suspended.⁹⁵

(d) The title to assets situate abroad of nationals in occupied territory is vested in the exiled government. The decree of the Royal Netherlands Government of May 24, 1940, to this effect has been upheld by the New York courts on the ground that it is not of a confiscatory nature but in conformity with the policy of the United States and of the State of New York.⁹⁶ For like reasons the Royal Norwegian Government by an order made on May 18, 1940, at Trondhjem in Norway, requisitioned all ships registered in Norway or belonging to a port there and situated outside the area in Norway which is occupied by an enemy Power, and which are owned by persons or companies carrying on business there. By the same decree the Norwegian Director of Shipping in England, called Curator, was given power to take over ships under construction outside the occupied area and contracts for the construction of ships belonging to such persons or companies.⁹⁷

(e) The Belgian Government in London created by decree, dated February 27, 1941,⁹⁸ a new entity called the Belgian Trading Committee (*Office*

authorities previous to and during the time of the invasion for keeping assets out of the hands of Germans, published in VI Dept. of State Bull., March 21, 1942, p. 291.

⁹³ Cf. Act of the Royal Netherlands Government passed on April 26, 1940, which became effective on May 8, 1940. The measure was reviewed by the New York Supreme Court on Nov. 28, 1941, in *Amstelbank, N. V. v. Guaranty Trust Co. of New York*, 31 N.Y.S. 2d, 194.

For Belgium, see Art. 8 of the Act. of Feb. 19, 1942, concerning the administration of commercial companies in war time. *Moniteur Belge* (March 31, 1942), London, No. 8, pp. 174, 182.

⁹⁴ Decree of Royal Netherlands Government in London dated June 7, 1940, 2 Art. 6b and Art. 16. See also decree of the President of the Republic of Poland dated Feb. 26, 1940, regarding the management and disposition of Polish property abroad, published in Angers in the Official Journal, No. 4, p. 10, and Art. 14 of the Belgian law of Feb. 19, 1942, *supra*.

⁹⁵ See decree of the Belgian Government of Oct. 31, 1940, *Moniteur Belge* (Nov. 22, 1940), p. 4, and the Belgian law of Feb. 19, 1942, *supra*.

⁹⁶ *Anderson v. N. V. Transandine Handelsmaatschappij et al.*, May 22, 1941, 28 N.Y.S. (2d) 547, *aff'd* App. Div. 31 N.Y.S. (2d) 194.

⁹⁷ This decree has been reviewed and upheld by the King's Bench Division in *Lorentzen v. Lyddon & Co. Ltd.*, *supra*, note 87.

⁹⁸ *Moniteur Belge* (London), May 6, 1942, No. 10, p. 102.

Belge de Gestion et de Liquidation) the object of which is to administer assets or the proceeds thereof to which Belgian nationals and companies in the occupied territory are entitled and which were seized as enemy property outside the kingdom in Europe. It is interesting that, according to the express wording of this decree, this office claims that it is not answerable to any proceedings brought before any court other than the courts in Belgium. Thus, actions against this authority are suspended until after the termination of the belligerent occupation of the country. Likewise the Netherlands Government has formed new entities called "Commissions" to exercise rights in which persons in the occupied territory are interested.⁹⁹

(f) All measures adopted by the occupying Power are stated to be null and void.¹⁰⁰

Among financial measures it is worth mentioning that The Royal Netherlands Government has imposed on its subjects residing outside the occupied territories a special income tax.¹⁰¹ The solidarity between exiled governments has found a lively expression in the decree authorizing the Belgian Government to extend a loan to the Grand Duchy of Luxembourg.¹⁰² In addition to budgetary measures, others were enacted for reorganizing the state banks abroad.¹⁰³

In general, it can be said that the legislative activity of the exiled governments is confined to meeting the emergency condition. No changes of municipal, substantive or procedural law have been enacted, except those dictated by considerations of warfare.¹⁰⁴

ENFORCEMENT OF DECREES

Personal supremacy is clearly subordinated to the territorial. The imperium yields to the dominium. It would be untenable if the exiled governments functioning on foreign soil were to attempt to enforce their decrees

⁹⁹ Art. 12 of the Royal Netherlands Decree of June 7, 1940.

¹⁰⁰ Most remarkable are the decrees of the Belgian Government of Jan. 10, 1941, dealing with the effects of belligerent occupation (*Moniteur Belge*, London), Feb. 25, 1941, pp. 44, 46. See also the Polish presidential decree of Nov. 30, 1939 invalidating all acts of the occupying Power, in Polish Official Gazette, Dec. 2, 1939, No. 102. The decree issued by the Yugoslav Government under date of June 28, 1942, published in London on June 18, 1942; the decree of the Luxembourg Government dated April 20, 1941 (Circular No. 2268 of Federal Reserve Bank of New York).

¹⁰¹ Decree of the Netherlands Government in London dated Sept. 18, 1941, in *Staatsblad van het Koninkrijk Nederlanden*, No. B 78, as amended on Feb. 14, 1942.

¹⁰² Decree dated June 17, 1941. *Moniteur Belge*, London, Aug. 8, 1941, No. 17, p. 209.

¹⁰³ As an illustration, reference is made to the decree concerning the activity and the organization of the Belgian National Bank, *Moniteur Belge*, Dec. 10, 1941, London, No. 23, p. 274.

¹⁰⁴ The Norwegian Government has, however, issued a provisional decree changing the penal code to enable the courts in Norway to prosecute Norwegian subjects even after the termination of the occupation for treason and for membership in "Nasjonal Samling," and for other acts endangering the security and independence of the country, and to impose capital punishment. (Norwegian provisional decrees dated Oct. 3, 1941, and Jan. 22, 1942.)

themselves. They have to look to the courts and authorities of the territorial sovereign for support and coöperation in giving effect to their decrees. Indeed this support by British Parliament and authorities has not been denied.

In a recent decision of the King's Bench Division handed down on December 19, 1941,¹⁰⁵ the court gave effect to the Order in Council of the Royal Norwegian Government made on May 18, 1940, at Trondhjem in Norway just before the King and his government escaped to England. In this case the plaintiff, acting as Curator appointed by the Norwegian Government for and on behalf of a ship-owner carrying on in the occupied territory of Norway, brought suit as assignee on a claim of the ship-owner against an English defendant. The High Court of Justice, after having cited very fully the decision of Mr. Justice Shientag in the *Transandine Case*,¹⁰⁶ concedes that the law in England is the same as that laid down in the above American case.

The Norwegian decree affecting assets situated in England was enforced for two main reasons: that it is not confiscatory in character, and, that the policy of the Norwegian Government is in complete harmony with that of England. Both countries are engaged in a desperate war for their existence. The judge in this case said: "To suggest that the English courts have no power to give effect to this decree making over to the Norwegian Government ships under construction in this country seems to me to be almost shocking."¹⁰⁷ In view of the revolutionary decision of the Supreme Court of the United States on February 2, 1942, *United States v. Pink*,¹⁰⁸ it is of interest to note the great importance attached by the English court to the circumstance that the legislation is not confiscatory in character.

While in the above case concerning the enforcement of the Norwegian decree issued immediately before the removal of the government to England, the English judge followed the American *Transandine* case, the reasoning of the King's Bench Division in the *Amand* case is rather different. In upholding the decree of May 24, 1940, Mr. Justice Shientag in the *Transandine* decision held that "the statement of the duly accredited Envoy Extraordinary and Minister Plenipotentiary of the Netherlands to the United States to the effect that the decree is a valid and binding act of the Royal Netherlands Government . . . is conclusive in our courts as to the law of the Netherlands." The circumstance that the Royal Netherlands decree was promulgated in London, England, rather than at The Hague was carefully considered, but the judge concluded that this was "immaterial in view of the fact that our government has officially recognized the Netherlands Government since its temporary residence in London."¹⁰⁹

¹⁰⁵ *Lorentzen v. Lyddon*, *supra*, note 87.

¹⁰⁶ *Supra*, note 96.

¹⁰⁷ *Supra*, note 87.

¹⁰⁸ This JOURNAL, Vol. 36 (1942), p. 309. See also the editorial comments in this JOURNAL, *ibid.*, by Edwin Borchard, pp. 275, 282, and by P. C. Jessup, pp. 282, 288.

¹⁰⁹ *Ibid.*, *supra*, note 96.

In the *Amand* case, however, all the judges concluded that it would be wrong to refuse to examine the validity of the acts of exiled sovereigns. In previous decisions, in particular those dealing with the Russian expropriation cases, the decrees of the U.S.S.R., the enforcement of which was sought abroad, were issued *within its own territory* and the validity of such acts could have been examined by the courts in Russia. Thus the question arose whether the courts abroad should be allowed to *re-examine* the acts of a foreign government. But in the case of, say, the Netherlands Government, the decrees were promulgated *outside* Holland and cannot be reviewed by Dutch courts as long as the country is under enemy control. In these very special circumstances the King's Bench Division unanimously decided that a Netherlands subject living under the protection of the British Crown should not be denied the right to have the acts of The Netherlands Government temporarily established in England, examined by English courts.¹¹⁰

Non-recognition of the acts of governments-in-exile on the ground of public policy need not be considered. The policies of the United Nations are "coördinated" and kept in harmony with the policy of the United States and Great Britain. Hence it is hardly conceivable that a decree promulgated by exiled sovereigns in England should be contrary to the public policy of the forum of the Allied Governments.

ALLIED LABOR FORCE

For the purpose of using in the common war effort nationals of the United Nations residing in Great Britain who are unfit for military service, the Governments of Belgium, Czechoslovakia, The Netherlands, Norway, Poland and the Free French authority have entered into agreements with the British Government. The object of these agreements is to regulate the employment of their nationals and to provide for the registration at the local labor exchanges of all persons above the age of sixteen and up to fifty in the case of women, and up to the age of 65 in that of men. As a result thereof the International Labor Force Orders were issued by the Minister of Labor and National Service under Defense Regulation 58A.¹¹¹ The enrollment of aliens for noncombatant services is a usage recognized in international law. The textbook writers distinguish between foreigners who are temporarily in the country and those who are permanent residents or at least staying there for longer periods. The right to requisition their services is applied to the latter class only.¹¹² But the orders by the Minister of Labor and National

¹¹⁰ *Supra*, note 74. Arnold McNair in his article cited *supra*, note 60, writes at p. 80, note 94, that he believes "the rule which prevents an English court from sitting in judgment upon the validity of the acts of a foreign state does not mean that it cannot make inquiry as to the formal validity of those acts and their nature."

¹¹¹ S. R. & O. 1941, No. 719 for Belgian nationals; 720 for Netherlands nationals; 721 for Norwegian nationals; 722 for Polish nationals; 723 for Czechoslovak nationals; 724 for French nationals.

¹¹² Oppenheim, *International Law* (5th ed. by Lauterpacht), Vol. I, par. 317; Hall, *International Law*, par. 61.

Service refer to all nationals "who are within Great Britain at the date on which this Order comes into effect." This difference is, however, of no essential practical consequence. It is not conceivable that there are at present visitors in Great Britain who might feel aggrieved by the registration requirement. Moreover the orders are based not only on the English Defense Regulations of 1939 but on agreements concluded between the British Government and the Allied Governments concerned. Hence the exiled governments are coöperating with the authorities in England for enrolling their nationals in British war industry.

MAINTENANCE OF ARMED FORCES AND CONSCRIPTION ON FOREIGN TERRITORY

More important than the diplomatic and legislative activity is the fact that each one of the governments-in-exile has organized and is maintaining armed forces to continue the fight against the enemy.¹¹³ These governments have issued decrees for the conscription of their subjects residing outside the territories occupied by the enemy.¹¹⁴ The validity of these decrees was challenged in the Amand case on two grounds based on international law. It was contended that no foreign government can recruit its subjects living abroad, since the recruiting of an army in a foreign country is an encroachment on the sovereignty of such country. It is, however, well recognized that "in consequence of its personal supremacy a state retains its power even over such subjects as emigrate without thereby losing their citizenship. A state may, therefore, command its citizens abroad to come home and fulfill their military service . . . and can punish them on their return for crimes they have committed abroad."¹¹⁵ To be sure, no state can use force to compel its citizens abroad to return. Professor Borchard¹¹⁶ points out that "self-preservation gives the state the necessary right of calling upon its citizens

¹¹³ Belgium has an army in England and pilots in the Royal Air Force; separate air squadrons are being formed. Czechoslovakia has organized an independent self-contained brigade and an air force. The Free French forces assembled under Gen. de Gaulle's command number about 100,000 trained soldiers and 2,000 pilots. Of Luxembourg there are several hundred volunteers fighting with the Belgian forces and nearly 1,000 with the Free French. The Dutch contingent in Great Britain consists of approximately 5,000 draftees, and Netherlands air squadrons are serving with the RAF. Norwegian training camps are established in England and Scotland, in Toronto and on the Canadian coast to turn out Norwegian pilots, naval officers, sailors and soldiers. The Polish Army is the largest of the armed forces of the exiled governments. Of Greece, two fully equipped brigades are in the Middle East, as are also some Yugoslav units.

The navies of the exiled governments, including the Free French, consisted in September, 1941, of not less than 187 warships, including corvettes and mine sweepers, manned by 14,730 officers and men. The largest force were those of Norway with 58 ships, then Free French with 42 ships, and the Netherlands with 39 ships. (19 Bulletin of International News, issued by the Royal Institute of International Affairs, p. 1202.)

¹¹⁴ See the Netherlands decree dated Aug. 18, 1940, published in Official Gazette in London, and the Belgian decrees published in *Moniteur Belge* (London), 1941, p. 7, and 1942, p. 6.

¹¹⁵ See Oppenheim, *International Law, op. cit.*, p. 235.

¹¹⁶ *Diplomatic Protection of Citizens Abroad* (1915), p. 21.

for military duty, for which purpose the state may recall its absent citizens. The state of residence is not, however, obligated to facilitate his return to fulfill the obligations imposed by his national law, though it is bound not to prevent the performance of these duties."

In the debate on the conscription decrees issued by foreign governments-in-exile the Prime Minister of Canada made on May 1, 1941, the following statement in the House of Commons:

A foreign government which has a legal system imposing compulsory military service on its nationals abroad, can, under existing international practice, provide for calling them up. Its representatives can bring the call to the attention of the nationals. They cannot exercise any compulsion within Canada in order to induce them to respond to the call.¹¹⁷

From the point of view of international law it was certainly still less objectionable for the exiled government to do in England what it was entitled to do in its own territory.

The other argument based on international law is that since no power can introduce an army lawfully into another country, *a fortiori* it cannot there add persons to its army. True, an army retreating into neutral territory must be disarmed and prevented from again performing military acts against the enemy during the war.¹¹⁸ But the exiled governments are in alliance with the British Government and their soldiers arrived in England after the alliance had been concluded. The retreat of the forces to England, the country of a co-belligerent, in the course of warlike operations cannot be construed as a violation of international law. Nor is it contrary to any legal principle that a foreign army lawfully entering the country increases its forces by the enlistment or induction of its countrymen residing there.

For the execution of its calling-up notices the exiled governments have to rely upon appropriate measures to be adopted and authorized by British authorities. For this reason the British Parliament enacted the Allied Forces Act, 1940.¹¹⁹ The Allied Forces (Application of 23 Geo. V, c. 6) (No. 1) Orders, 1940, issued in pursuance thereof, made certain sections of the Army Act,¹²⁰ as well as of the Naval Discipline and Air Force Acts, applicable to Belgian, Czechoslovakian, Netherlands, Norwegian, and Polish subjects residing in England.¹²¹

¹¹⁷ Canadian Bar Review (1942), pp. 169-170.

¹¹⁸ See Art. 11, Chap. II, of 5th Hague Convention of 1907 (Rights and Duties of Neutral Powers and Persons in case of War on Land), this JOURNAL, Supplement, Vol. 2 (1908), p. 120.

¹¹⁹ The Act is published in Halsbury's Complete Statutes of England, Vol. 33, p. 466. See also Butterworth's Emergency Legislation Service Statutes, Supplement No. 6 (1940), p. 103.

¹²⁰ 17 Halsbury's Statutes, p. 212.

¹²¹ The Act is also applicable to Free French Forces (S. R. & O. 1941, No. 47), and to the Greek and Yugoslav Forces (S. R. & O. 1941, No. 651).

LEGAL STATUS OF ALLIED FORCES IN ENGLAND¹²²

In international law and practice foreign men-of-war and foreign armed forces enjoy extraterritoriality. Hyde¹²³ emphasizes that "strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign military force which, with the consent of the territorial sovereign, enters its domain."¹²⁴ During the last war it was beyond any doubt that the American and British Expeditionary Forces were immune from French jurisdiction. The Attorney General of England expressed the same view as recently as August, 1940, when he told the House of Commons: "When we have our forces in foreign territory we ask for and always get complete permission to apply our own military code."¹²⁵ This practice is confirmed by very recent events of this war. The agreement under date of March 27, 1941, between the American and British Governments relating to naval and air bases in Newfoundland, Bermuda, Jamaica and other islands in the American hemisphere provides that "the United States shall have the absolute right in the first instance to assume and exercise jurisdiction" in any case in which "a member of the United States forces . . . shall be charged with having committed either within or without the leased areas an offence of a military nature punishable under the law of the United States, including, but not restricted to, treason, an offence relating to sabotage or espionage, or any other offence relating to the security and protection of United States naval and air bases, establishments, equipment or other property or to operations of the Government of the United States in the territory." Furthermore, the American soldiers and their wives and children are exempt from taxes levied by reason of employment in the territory.¹²⁶ While this paper was being written the British Parliament approved a plan whereby members of the American Expeditionary Force in Great Britain violating British law will be tried by American tribunals.¹²⁷

The legal status of the armed forces of the exiled governments is regulated by the Allied Forces Act, 1940, and the military treaty concluded by the British Government with the respective Allied Government.¹²⁸ The Attorney General of England admitted in the course of the debate on the bill that

¹²² See in general on this subject "The Jurisdiction over the Members of the Allied Forces in Great Britain," by E. Schwelb, in *Czechoslovak Yearbook of International Law* (London), 1942, p. 147; and for the first World War see Chalufour, *Le statut juridique des Troupes Alliées pendant la guerre 1914-1918*.

¹²³ *International Law*, par. 427, p. 432.

¹²⁴ In the same sense, Oppenheim, *op. cit.*, par. 127, p. 237.

¹²⁵ *Parl. Deb., H. C.*, Vol. 364, pp. 1404, 1405.

¹²⁶ Great Britain, *Treaty Series No. 2* (1941), Cmd. 6259; this *JOURNAL*, Supplement, Vol. 35 (1941), p. 134.

¹²⁷ *New York Times*, Aug. 6, 1942, p. 21.

¹²⁸ The British-Czechoslovak military treaty of Oct. 25, 1940, is discussed in the article cited *supra*, note 122. The treaties with the other exiled governments do not seem to have been published.

these foreign governments might say: "You do not in this Bill go as far as international law."¹²⁹ The position under the Act can be summarized as follows:

(1) The British courts have unrestricted jurisdiction to try members of any Allied force other than the American force for any act or omission constituting an offence against the law of the United Kingdom; if, therefore, a British court has sentenced or acquitted a soldier, the Allied service court is prohibited from dealing with the same matter; if, on the other hand, an Allied service court had first tried an offender, the British court is not prevented from exercising jurisdiction but shall in awarding punishment have regard to any penalty imposed by the service court.

(2) Offences of murder, manslaughter and rape shall be tried *exclusively* by the English civil courts.

(3) In matters of discipline and internal administration *exclusive* jurisdiction is vested in the Allied military court, except for offences constituting also a violation of British law.

(4) In civil matters the members of the Allied forces enjoy no privileges.

(5) The British courts have no jurisdiction over matters concerning pay, terms of service or discharge of members of an Allied force.

ADMINISTRATION OF JUSTICE BY FOREIGN GOVERNMENTS

The right to administer justice according to the laws of its own country by its own judges is another equally vital attribute of a sovereign state.

(a) *Allied Service Court.* For exercising jurisdiction on matters concerning discipline and internal administration the Allied Governments have established military tribunals. These courts try military offences according to their own penal code. It is interesting that the Belgian Government has established in England a French and Flemish military tribunal.¹³⁰ Also the Free French Forces have their own courts martial. To assist the Allied forces in the apprehension and detention of offenders, the British authority is under a statutory duty¹³¹ to coöperate with the officer commanding such force on a basis equal to that enjoyed by a corresponding officer of the British force. Any penalty imposed by an Allied military court against an Allied soldier will be executed in a British prison. The British Government did not exercise any influence on the constitution of such courts nor its proceedings nor the law which is applied. No appeal lies from such courts to any English authority.

(b) *Mixed Courts Martial.*¹³² The airmen of Allied Governments in Eng-

¹²⁹ Parl. Deb., H. C., Aug. 21, 1940, p. 1405.

¹³⁰ *Moniteur Belge*, Jan. 10, 1941, p. 11, and May 8, 1941, p. 118.

¹³¹ The Allied Forces (Penal Arrangements No. 1) Order, S. R. & O. 1940, No. 1817, concerns the forces of the Allied Governments, and the Allied Forces (Penal Arrangements No. 2) Order, S. R. & O. No. 49, the Free French Forces.

¹³² Mixed courts martial existed also during the last war. See, on this subject, the very interesting statement made by Lord Strabolgi in Parl. Deb., H. L., Aug. 13, 1940, p. 198.

land are not subject to the Allied military courts. The Czechoslovak officers and airmen commissioned and enlisted in the Royal Air Force Volunteer Reserve are subject to British Air Force law and to the discipline of the Royal Air Force unit to which they are attached. Yet mixed courts martial also have been created. They consist of a British officer as president and a British officer as well as an officer of the Allied force to which the person charged with an offence belongs, as members.¹²³

(c) *Allied Maritime Courts*.¹²⁴ The establishment of Allied Maritime Courts is a unique occurrence in legal history: judges of alien origin and citizenship, who were not appointed by the Lord Chancellor of England or any other British authority, but by a foreign government, are authorized by the British Parliament to investigate on British soil offences committed by *alien civilians*. Jurisdiction of these courts is confined to acts or omissions committed:

- (a) By any person on board an allied merchant ship;
- (b) By the master or any member of the crew of a merchant ship of an Allied Power in contravention of the merchant shipping law of that Power;
- (c) Any person who is both a national of an Allied Power and a seaman of that Power in contravention of the mercantile marine conscription law of that Power.¹²⁵

Proceedings before such newly created Maritime Courts are commenced through a summons issued by a British magistrate or by an arrest effected by a British police officer. The accused persons of alien nationality are tried by magistrates of their own country according to their own procedure, and convicted and sentenced for breaches of their own criminal law. The assistance of British authorities is required not only for bringing the accused person before the court but also for the summoning of witnesses. Furthermore, the person, if convicted, is detained in a British jail. The sentence rendered by such court is final, a review being allowed only on the ground of excess of jurisdiction, in which event the English High Court of Justice makes the final determination. In case of a conflict of jurisdiction between a British and an Allied court, the former is accorded preference. British subjects cannot be tried by these courts, and if a person summoned to appear before an Allied Maritime Court claims to be a British subject, the issue of nationality has to be determined first by an English tribunal designated for this purpose.

The mere citation of these facts is sufficient to illustrate the impressive advance which this marks in the province of international law. The execution of foreign judgments has always been a favorite topic of discussion among international lawyers. Many solutions have been advocated but in

¹²³ See the Allied Forces (Free French Air Force) Order, S. R. & O. 1941, No. 200; the Allied Forces (Norwegian Air Force) Order, S. R. & O. 1941, No. 918.

¹²⁴ Allied Powers (Maritime Courts Act), 1941.

¹²⁵ Allied Powers Maritime Courts Regulations, S. R. & O. 1941, No. 872.

peace time none had won the approval of the jurists of the more important countries. It is attributable to the war that now in England judgments of foreign courts are executed like a British judgment without exequatur, without considerations of public policy and without examination of the competency of the court.

Maritime Courts are established by Belgium, Greece, The Netherlands, Norway, Poland and Yugoslavia.¹²⁶ Their importance can best be judged by the substantial size of the merchant navy of these governments, including the Free French, aggregating 6,000,000 dead weight tons and equipped with 30,000 officers and men.¹²⁷ As Viscount Simon¹²⁸ said on the occasion of the inauguration of The Netherlands Maritime High Court, "this development would have astonished the barons of Runnymede and would have seriously disturbed the peace of mind of Sir Edward Coke or Lord Mansfield," and, it may be added, would have also surprised a genius like Hugo Grotius.

CONCLUSION

The privileges granted by the British Government to governments-in-exile do not affect the principle that the *imperium* is subordinated to the *dominium*. The duty to respect the territorial sovereignty must prevent a state from performing acts which, although within its competence, in accordance with its personal supremacy, would violate the territorial supremacy. A state cannot exercise rights of sovereignty in the territory of another state without the latter's consent.

It would be intolerable that the emissaries of even the most friendly Allied Power should be allowed to go about the country and summon or arrest anybody inside the territorial borders and hail him before a tribunal. That must be done through the ordinary machinery of justice provided by the territorial sovereign.¹²⁹

The co-existence of two or more sovereign governments on the same territory has created a number of unprecedented legal problems. Their solution was possible because of the common cause which unites the Allied nations. The governments-in-exile established in England are not the only

¹²⁶ Pursuant to this Act, The Netherlands Government issued a decree dated Oct. 3, 1941, and established a Maritime High Court in London, as well as six courts of summary jurisdiction in Cardiff, Fleetwood, Glasgow, Liverpool, London and Newcastle. The other government with a great merchant navy, the Kingdom of Norway, established Maritime Courts in the above mentioned towns and an appellate court in London. For the Belgian Maritime Court, see *Moniteur Belge*, Oct. 28 and Nov. 14, 1941, p. 265.

¹²⁷ According to the radio address of the British Lord of the Admiralty, the merchant navy of the exiled governments consisted in August, 1941, of 1,618 vessels, to wit, 720 of Norway, 480 of The Netherlands, 240 of Greece, 92 of the Free French, 54 of Belgium, and 32 of Poland. (18 Bulletin of International News, p. 1202.) To these figures must be added 48 of Yugoslavia.

¹²⁸ See his speech published in *Law Quarterly Review*, Vol. 58, p. 223.

¹²⁹ 119 Parl. Deb., H. L., p. 288; Oppenheim, *op. cit.*, Vol. 1, p. 241.

example of such coöperation of several independent states functioning in the same territory. The agreement signed at London on March 27, 1941, between Great Britain and this country for the use and operation of bases in Newfoundland, Bermuda, Bahamas, Jamaica, St. Lucia, Trinidad and British Guiana, is another illustration. It may also be mentioned that the Icelandic Government entrusted the protection of its country to the United States on the condition that, among other undertakings, the United States promise to recognize the absolute independence and sovereignty of Iceland and not to interfere with the Government now or hereafter.¹⁴⁰

Certainly a coöperation of this kind requires good will on both sides by the territorial sovereign and by the "invitee" or "licensee" government. The rigidity of the notion of sovereignty proved to be an obstacle to a healthy development of international law and order in the past. It is to be hoped that when the last gun is fired the lesson of a "Miniature Europe" in London will not be forgotten.

¹⁴⁰ This JOURNAL, Supplement, Vol. 35 (1941), p. 194; Dept. of State Bull., July 12, 1941, pp. 15, 409.

CIVIL AVIATION AFTER THE WAR

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The way the peace negotiators shape the new order in the air may well have a decisive influence on the fate of mankind for generations to come. When the peace negotiators come to consider the status of the airspace and the problems of air communications, there will be not only specific questions of commercial interest and the potential military value of these communications requiring their attention, but they will have to realize that, as the energies of more and more men seek scope in the air, resulting in a general outward impulse of the nations, issues of vital moment affecting the welfare of mankind are at stake. It is clear that the solution of this problem will be determined, to a great extent, by the solution of the problem as to the form or constitution of the new international political order, which is closely bound up with the future of the group-unit of power.

In 1919 the peace negotiators had to lay down rules to govern air navigation without having a background of experience to guide them. The peace negotiators after this war will have to take account of twenty years' experience in civil aviation. The question arises, therefore, whether this experience has resulted in any continuity in the policy of governments; and in the attempt to answer this question there are to be considered the International Conference for Air Navigation held at Paris in 1910, the Peace Conference at Versailles in 1919, and the Extraordinary Session of the International Commission for Air Navigation at Paris in 1929.

Before, however, considering the results attained at these three international conferences, attention may be drawn to the fact that in international communications certain basic principles remain the same in cause and in effect from age to age. Thus, through the establishment of the great maritime routes, resulting from the discovery of the passage by the Cape of Good Hope and the discovery of America, the world acquired an entirely new aspect: the importance of portions of the earth and their consequent interest to mankind were fundamentally changed by maritime navigation. In a study of the character of maritime navigation, two main elements should be distinguished: (1) the social element, "man's union with man," and (2) the element of power, which is to be subdivided into the economic instrument and the potential military instrument. The second element has led in the history of the sea to rivalries often culminating in violence; the first element, however, has caused the law of nations to score its first successes by reducing the pretensions of states to the exclusive use of the sea. Through the con-

quest of the airspaces the aspect of the world has changed in the same way as it was changed in the sixteenth century through the conquest of the seas. The bases of economic and political power are being gradually shifted and national ambitions transformed; and in the future air commerce will exercise an ever-growing influence upon the wealth and strength of nations. The air will become more and more, therefore, not only a scene of commercial activities, but of political developments, and the question of air routes will soon emerge as one involving some of the primary objects of the external policy of nations.

In air navigation the same two main elements can be distinguished as have been determined in sea navigation. As through air navigation, however, the limitations of time and space which nature imposes upon man are overcome to an even greater extent than through navigation by sea, the social importance of this newest means of communication surpasses that of all the older means. Since the economic strength represented by air routes constitutes, as does that of sea routes, an instrument of political power, neither of them can, even in the purely economic field, be separated from politics. As far as potential military value is concerned, especially for ancillary services, such as training, supply, and troop carrying, again an analogy exists, though in aviation the threat from a military point of view is even greater than in sea navigation, the former penetrating to the heart of a country, horizontally as well as vertically, and practically knowing no bounds.

A clear realization of the analogies in the problems of sea and air communications is a necessary precedent to the formulation of those ideas which are to determine the future status of the air.

Taking into account the two main elements in air communications that have been distinguished, the international rules which are to govern these communications should satisfy two fundamental conditions. They should further the development of air navigation as much as possible; but, as this development will necessarily lead to rivalries, the rules should be such as not to create a sense of injury or injustice which would cause the rivalries to culminate in violence.

Attention will now be drawn to the political and legal aspects of the problem under consideration.

I. THE POLITICAL ASPECT

In 1910, at the invitation of the French Government, nineteen states sent representatives to Paris to participate in an International Conference on Air Navigation. In his opening speech, M. Louis Renault, President of the Conference, declared the aim of the conference to be the examination of the problem as to the rules by which the freedom of circulation of aëroplanes could be reconciled in the best way possible, with the legitimate interests of states. He advised the delegates not to concern themselves too much with the formulation of abstract principles regarding the nature of the rights of

states in the airspace.¹ The German, French and British delegations each submitted an important *exposé* of their ideas in respect to this matter.

The German *exposé* began with the recognition of freedom of passage. The underlying state should only restrict this freedom of passage for reasons of security of the state or of its inhabitants. In order to avoid discrimination, no restriction should be applied to foreign aircraft if it were not equally applied to the national aircraft of the state making the restriction. This rule, the German delegation maintains, would mean nothing new. In most of the treaties of commerce and navigation is to be found the stipulation that the vessels of each of the contracting parties will, in the ports and waters of the other party, enjoy the same treatment as national vessels, so that it would not be possible to impose a restriction on foreign vessels without imposing it at the same time on one's own national vessels. The German delegation was willing to admit only two exceptions to this general principle: the first motivated by a *droit de rétorsion*; the second having regard to cabotage.

The French delegation in its *exposé* came to practically the same conclusions as the Germans. Freedom of passage should be recognized, restricted only by the rights of the state "*nécessaires à sa conservation*." The restrictions were stated by the delegation, and from the list proposed it can be seen that this *droit de conservation* was interpreted *stricto sensu*. Nothing was said, for instance, regarding the possibility of restrictions to be made to protect the economic interests of the state against the competition of foreign states.

The British delegation in its *exposé* struck a somewhat different chord. Several authors who refer to the Conference of 1910, express the view that the conference broke down because the British stuck to the theory of the state's absolute sovereignty over the airspace: "*thèse soutenue avec obstination et intransigeance*."² The minutes of the conference do not confirm this statement. It is true that the British delegation did not want to accept the proposals of the Germans and the French, and that on their proposal the conference was adjourned; but emphasis should be laid on the fact that the fundamental principle of freedom of passage, to be restricted only by the security of the state, was also fully adhered to by the British delegation.³ They did not claim, therefore, an absolute sovereignty, but recognized that whatever rights the state had over the airspace above its territory, these rights were restricted by freedom of passage.

The divergence of opinion between the British, on the one hand, and the German and the French, on the other, concerned the question of discrimination between foreign and national aircraft. On that point the British

¹ *Procès-Verbaux de la Conférence Internationale de Navigation Aérienne (Paris, 18 Mai-29 Juin, 1910)*, p. 26.

² See Giannini "*La Souveraineté des États sur l'espace aérien*," *Droit Aérien*, 1931, p. 3.

³ See *Procès-Verbaux de la Conférence*, *ibid.*, p. 270.

delegation was of opinion that the German and French proposals did not sufficiently guarantee the security of the state, because the possibility of discrimination should be reserved in case of war or in urgent circumstances. In normal times England was perfectly willing to allow the entrance of aircraft in the same way as foreigners and ships were allowed in the country and in territorial waters.

The President of the conference held that by suppressing the rule prohibiting discrimination, one of the fundamental guarantees for the admission of foreign aircraft would disappear. It was on this question that the conference split. Notwithstanding its failure to achieve definite results, the conference has been of importance because it brought out the ideas on civil aviation which governed a great number of states before the war of 1914-1918. To recapitulate these ideas: The principle of freedom of passage was unanimously recognized, the only restriction on that principle being the security of the state and of its inhabitants. No state wished to reserve the right to forbid the entrance of foreign aircraft in its territory for other reasons, such as the prevention of competition. In the commercial domain, the idea was to follow the principles valid for ships passing through territorial waters and entering into ports.

Another advantage of the Conference of 1910 was that the draft convention prepared by it proved of value in forming the International Convention for Aërial Navigation which was signed at Paris on October 13, 1919.

Were the delegates of the Peace Conference of 1919 inspired by the same ideas as were the delegates of the Conference of 1910, or had the war brought about a change in the minds of the states as far as aviation was concerned? A clear answer will not be found in the text of the Convention of 1919, for this text did not, as we shall see, assure the realization of the objective in view. The answer as to what the real objective was can be found in the minutes of the meetings of the commissions which prepared the draft convention.

The Aëronautical Commission of the Peace Conference instituted a sub-committee and charged it with the application of the following directions:

- (a) Complete sovereignty over the airspace by the subjacent state to be recognized.
- (b) To international aviation the greatest possible freedom should be given compatible with
 - (1) the safety of the state,
 - (2) the application of regulations regarding the admission of aëroplanes (these regulations must not be excessive),
 - (3) the internal legislation of the state.
- (c) As regards international regulations relating to the admission and treatment of aircraft of contracting states, recognition of the principle of absence of all difference based on nationality.⁴

⁴ *Procès-Verbaux de la Commission de l'Aéronautique, La Paix de Versailles VIII—La Documentation Internationale*, 1934, p. 129.

It was agreed that these principles should apply only to contracting states: the Commission did not wish the vanquished to profit by the freedom of passage.

At the meeting of the subcommittee, the British delegate expressed clearly the principle by which the subcommittee should be guided by remarking that the restrictions to be made should only pertain to the proper security of the state—sovereignty allowing the state to indicate the passages through which foreign aircraft would be allowed to pass. This delegate further remarked that aëroplanes would not be incommoded in the slightest degree by the declaration of sovereignty. Their situation would not be different from that of a ship exercising its right of passage through territorial waters.⁵

The Italian delegation then proposed that the establishment of international airlines should be subject to the consent of the states flown over, which would regulate their operation.⁶

It has to be borne in mind, however, that in the subcommittee's report to the Commission, freedom of passage was specifically recognized. The declaration of complete sovereignty was intended to apply only to states not being parties to the convention. This complete sovereignty should not be maintained in the relations between states which trusted one another. International air carriage was to be open to foreign aircraft, but they could not take or deposit passengers or goods from one point to another in the same state.

Paragraph 4 of Article 15 of the draft convention as proposed by the subcommittee stipulated that the establishment of foreign air *lines* was subject to the consent of the state flown over.

General Sykes, the delegate of Great Britain, proposed to strike out this paragraph. The arguments which he advanced show that he considered this article only to have in view the air *line* kept within narrow limits. This was not the *raison d'être* of the article as intended by the subcommittee. General Sykes considered, however, that if the term *lines* should be given the significance of wide zones that would enable aircraft to select as favorable a route as possible, the difficulty would be solved.⁷

The French delegate then proposed to substitute the word *lines* by *ways*. The word "consent" in the article did not imply an idea of obstruction. It would be difficult to conceive that France, for example, would not help in every way possible the party who wanted to construct an airline. There again the idea of the *route*, not of the *service*, was in the delegate's mind.

Admiral Knapp of the United States declared that, in the opinion of the American delegation, the paragraph was not at all necessary as in any case the state had the right to prevent the establishment of aërodromes and all constructions on its territory. He was not opposed to the principle, but he

⁵ *Procès Verbaux de la Commission de l'Aéronautique, La Paix de Versailles VIII—La Documentation Internationale*, 1084, p. 435.

⁶ *Ibid.*, p. 264.

⁷ *Ibid.*, p. 50.

considered the paragraph to be superfluous and in its present wording lacking in clarity. He proposed to substitute the following words: "Toutes les routes employées dans la navigation aérienne internationale seront désignées par l'État ou les États traversés." This amendment was rejected, only the United States and Great Britain being in favor.

Emphasis should be laid on the fact that at the end of the discussion the President, General Duval, observed that the American reservation regarding the paragraph in question concerned the form and not the "fond," and would therefore be one of the easiest to suppress.⁸ If the President and the Commission had considered the divergence to be on the service or the line, the question certainly would have been "de fond." In consideration of this fact one can rightly argue that the Commission, having agreed to the substitution of "lines" by "ways," did not want the paragraph to be applied to services, once the way had been established. The fact that the idea of the subcommittee was different is immaterial, as their proposal was changed. On the other hand, the rejection of the American proposal regarding the designation of the routes seems to indicate that the ambiguity of the expression "ways" and the resulting possibility of applying it in different ways, was intended by the majority of the Commission so as to avoid going to the bottom of this difficult question. The ambiguity of the rule was proved by the difficulty which arose some years later between England and Belgium.

At the Fourteenth Session of the ICAN [International Commission for Air Navigation], which was held in May, 1928, the controversy was discussed. The way in which the world's air traffic companies regarded the question at issue was set forth in a letter of the International Air Traffic Association to the ICAN (June 2, 1928).⁹ In this letter the IATA ranged itself on the side of those who interpreted the word "ways" as routes and not as services. Once a route has been established with the consent of the state flown over, the air traffic company wishing to use this route should be free to do so. This letter indicated a common feeling of the air traffic companies as to what was considered just and reasonable in their mutual relations. After a discussion of the problem, the ICAN passed a resolution declaring itself incompetent to interpret the article in question and expressing the hope that all differences of opinion might be adjusted by amicable settlement. The discussion had in fact proved that no general agreement, so necessary for the assurance of a certain order in aviation, then existed. By leaving the interpretation of Paragraph 4 of Article 15 in suspense, the door was left open for further dispute.

In October, 1928, Dr. Wegerdt, a high official of the German Ministry of Communications, published an article entitled "Germany and the Air Con-

⁸ *Procès-Verbaux de la Commission de l'Aéronautique, La Paix de Versailles VIII—La Documentation Internationale*, 1034, p. 98.

⁹ See *Procès-Verbaux de la 14ème Session de la Commission Internationale de la Navigation Aérienne (Genève 8-11 Juin, 1928)*, p. 58.

vention of 13th October, 1919." In this article the question of the revision of the convention, so as to facilitate the adhesion of Germany, was considered.

On the initiative of the ICAN, a conference for the purpose of examining the German proposals was called, the idea of the Commission being that not only the adhesion of Germany should be facilitated, but also that of all states not yet party to the convention, so as to ensure the uniformity of air navigation regulations all over the world. Seventeen states not parties to the convention attended the conference, making in all a representation of 43 states. After discussion, the question of freedom or of previous permission to be granted by the underlying state having been put to the vote, was decided to the disadvantage of freedom by 27 votes to 4. The United States, the British Empire, the Netherlands, and Sweden were the states in favor of freedom. It was realized, however, by these four states that previous permission need not in itself constitute a barrier to freedom of air navigation. What mattered were the motives on which permission could be refused. In the text adopted it was stipulated that a state *may* require its authorization for the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory. The word "may" indicates that a state has complete freedom to admit air traffic above its territory without restriction.

In the ten years which had elapsed since 1919 many states had drifted far away from the liberal spirit which inspired their delegates to declare, when preparing the Paris Convention, that to air navigation the same right of free passage should be granted as was given to shipping in territorial waters. The few clouds which had appeared on the horizon in 1919 had grown to such an extent that a great part of the free sky was darkened. Before considering the period 1929-1939 two international air conventions must be examined.

First, the Ibero-American Convention of October, 1926.¹⁰ On the points under discussion, this convention reproduces exactly the original text of the Paris Convention. The observations that have been made regarding this text apply equally to the Ibero-American Convention.

Secondly, the Pan American Convention of January, 1928.¹¹ In May, 1927, under the auspices of the Pan American Union, a series of conferences on questions concerning international aviation took place at Washington and a draft convention was prepared. This was sent to the Pan American Conference at Havana in January, 1928, which adopted it. In Article 1 the Pan American Convention follows the Paris Convention by recognizing that every Power has complete and exclusive sovereignty over the airspace above its territory. In Article 4, which corresponds to Article 2 of the Paris Convention, each contracting state undertakes in time of peace to accord freedom

¹⁰ Ratified by Argentina, Costa Rica, Dominican Republic, Mexico, Paraguay, Spain.

¹¹ Ratified by Chile, Costa Rica, Cuba, Dominican Republic, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, U. S. A.

of innocent passage above its territory. An important difference, however, between the two conventions lies in the fact that in the Pan American Convention nothing is said about previous authorization for airlines: this had been expressly provided for in Article 15 (4) of the Paris Convention.

When making a general survey of the political situation as to the air during the period 1929-1939, one point clearly stands out. The question of air communications is no longer a regional problem, but has become a world problem. Whereas the obstacles put in the way of airlines had, up to that period, primarily affected the separate continents, an entirely new aspect was opened through the drive for intercontinental connections. It should be borne in mind that though in continental air traffic the development of air communications has in many cases been retarded through the withholding of authorizations, the states have often managed to attain their aim by a roundabout way. In intercontinental traffic, however, at least in most cases, the roundabout way does not exist. The repercussions caused by obstacles in this domain are of an infinitely more serious nature.

Firstly, it may be noticed that Turkey passed a law prohibiting all transit flights over its territory. This not only affected continental air traffic—the connections between Turkey and the other countries on the European continent, but also resulted in the severance of intercontinental air communications to the East.

As the second instance, Spain should be mentioned. In the course of the year 1939 the Spanish Government refused to permit British Airways, Air France and K.L.M. to fly over Spanish territory. According to the periodical *Interavia*, the Spanish Government wanted to reserve landing and transit rights in Spain to companies belonging to the countries which had been the allies of Franco during the Civil War.¹²

As a third case, in 1937 the Government of the United States refused a request of the Dutch Government on behalf of the K.L.M. to open a new airline from Willemstad (Curaçao) to Miami.

Germany, in 1937, announced it was ready to set up a permanent transatlantic airmail service forthwith. According to *Aviation*, Washington refused its permission, taking the stand that it would grant no rights for such a service until an American company was ready to operate a service to Germany on a trip-for-trip basis.

In 1938 the Government of the United States took possession of the Pacific islands of Canton and Enderbury. Following Great Britain's protest, discussions between the two governments took place which resulted in a convention, signed on April 6, 1939, by which it was agreed that the islands in question would be governed by two officials, one American and one British.¹³ One part of this convention profoundly affects international air communications. It is stipulated that all landing rights on the islands are reserved

¹² See *Interavia*, No. 609, p. 8; No. 610, p. 11; No. 618, p. 10; No. 652, p. 8.

¹³ *Ibid.*, No. 633, p. 10.

exclusively for American and British air companies: no other company will be allowed to land on these territories. Considering the great importance of these islands as an intermediate stop for air services across the Pacific, the convention tends to monopolize air traffic in that region.

When we recapitulate the attitude of the states with the strongest developed civil aviation during the period under consideration, we come to the following conclusions:

Great Britain in 1910, 1919, and 1929 declared itself to be a strong partisan of the principle of freedom of passage. In 1929 Sir Sefton Brancker, Director of Civil Aviation in Great Britain, defending this principle before the Extraordinary Meeting of the International Commission for Air Navigation, admitted that one might accuse Great Britain of not always having taken decisions in conformity with this principle. This fact, he said, was due to material difficulties and it would soon be perceived that the British Government was honestly favorable to the régime of the greatest freedom of air navigation.¹⁴ In view of the agreement between Great Britain and the United States concerning Canton and Enderbury, one is justified in having some doubts regarding the willingness of Great Britain to apply the principle favored by Sir Sefton Brancker in all its consequences.

The United States of America declared itself in 1919 and 1929 a strong partisan of the principle of freedom of passage. Three conventions concluded by the United States in 1933 and 1934—the conventions with Sweden, Norway, and Denmark—bore witness to the same spirit.¹⁵ All three conventions contain an article preventing the contracting parties from impeding free circulation by arbitrary and vexatious measures and emphasizing the fact that only the needs of security and public order can justify restrictions on free circulation. A few years later, however, the attitude of the Government of the United States of America had completely changed, as the instances given above clearly prove. In 1938 Edward Warner, in an article published in *Foreign Affairs*,¹⁶ indicated the policy of the Government of the United States of America to be: no regular commercial aviation into the United States under a foreign flag without simultaneous provision for an equal amount of American flying on the same route.

France in 1910 and 1919 was a partisan of freedom of air navigation. In 1929 she took an attitude which, as her delegate, M. Flandin, frankly admitted, was inspired by purely selfish reasons. France considered that, in the future, aviation would succeed in establishing the thesis of freedom of air traffic; but she voted for a restricting text in the Paris Convention because she considered such a text a concession to the great colonial Powers which they could not reject.

¹⁴ See *Procès-Verbaux de la 16^e Session de la "ICAN," Paris, 10-15 Juin, 1929*, p. 45.

¹⁵ Sweden-U.S.A., 9 September, 1933. Norway-U.S.A., 16 October, 1933. Denmark-U.S.A., 24 March, 1934.

¹⁶ Ed. Warner, "Atlantic Airways," *Foreign Affairs*, Vol. 16, p. 594.

Germany in 1910 strongly adhered to the principle of freedom of air navigation, but in 1929 she was responsible for increasing the possibility under the Paris Convention of refusing innocent passage to foreign air traffic. An instructive study of freedom of passage for oversea air navigation, published in Germany just before the present war, discloses the fact that a change of front had been taking place in Germany.¹⁷ Considering the difficulties Germany experienced in her efforts to obtain permission for her transatlantic airline, difficulties which at the outbreak of the war had not yet been surmounted, such a change was to be expected.

Italy. In 1919 it was the Italian delegate who first insisted on the necessity of protecting national aviation against foreign enterprises; and in 1929 Italy stuck to her original attitude, but here also the difficulties experienced in the building up of intercontinental airlines appear to have caused a reversal of Italy's original attitude. Ambrosini, Italy's representative in many international air conferences, in an article published in 1938,¹⁸ propagates the idea of freedom for aëromaritime lines. Venturini, one of the Directors of the Italian air company Ala Littoria, in an article published in 1940, insists on freedom of passage for air services on the analogy of the freedom of shipping.¹⁹

Belgium was the direct cause of the restricting text in the Paris Convention. She declared herself, however, to be in favor of a régime of the greatest freedom, but considered technical difficulties to stand in the way of the immediate application of this principle.

Finally, the Netherlands and Sweden have proved themselves to be fighters for freedom of the air that have stuck resolutely to their principles from the very beginning down to the present time.

The unprecedentedly accelerated speed of change in the last thirty years has been such that, politically, air navigation has already passed through many of the phases which it took sea navigation centuries to span.

As to air navigation, it may be observed that in 1910 the states were pre-occupied only with guaranteeing the safety of their territory; the necessity of permitting other states to navigate freely to and over their territory was recognized to the fullest extent where this freedom did not affect the security of the state. The period 1910-1919 can thus be compared with that period in the history of shipping in which the adjacent seas were appropriated primarily to secure the land from invasion.

In 1919 the first consideration was still the security of the states, but the study of the minutes of the meetings held by the Aëronautical Commission

¹⁷ Dr. Christensen, *Der Grundsatz der Verkehrsfreiheit im überseeischen Luftverkehr*, Berlin, 1939.

¹⁸ A. Ambrosini, "Souveraineté et Trafic Aérien International," *Revue Générale de Droit Aérien*, 1939, p. 551.

¹⁹ E. Venturini, "L'Aviation civile en temps de paix," *Interavia*, No. 724-725, p. 19.

of the Peace Conference reveals the fact that some small clouds were already appearing on the horizon of the free sky. In the minds of some of the delegates the idea took shape to use the power of the state over the air to protect its own air navigation against foreign competition. As in shipping, the pretensions to the appropriation of the sea and the power to restrict foreign sea commerce grew in proportion to the increase of the direct profits to be expected from them, so in aviation the pretensions to unrestricted sovereignty—not in doctrine but in practice—grew in proportion to the development of aviation during the period from 1919 to 1929. The Conference of the International Commission for Air Navigation of 1929 proved how little was left of the original idea of freedom.

In shipping, the entire situation was changed through the discovery of new maritime routes, because from that moment the problem of free navigation was no longer a regional problem but had become a world problem. The first impulse of the Powers which mastered these routes was to monopolize them under the pretext that their discovery entitled them to make an exclusive use of them. But mankind promptly revolted against a principle which was opposed to the spirit of freedom created throughout the world by these discoveries. A century after the discoveries the principle of exclusivism was generally recognized to be moribund and freedom prevailed.

In aviation also the first impulse of the country which mastered the world air routes was to try to protect its position by excluding others. If the United States, the master of the world air routes, does not go so far as to try to secure a monopoly over the oceans, its attitude does fail to appreciate the spirit which the establishment of world aviation must necessarily create, in the same way as the attitude of Spain and Portugal in the sixteenth century failed to appreciate the spirit created by world sea routes.

II. THE LEGAL ASPECT

Attention has already been drawn to the fact that in 1919 the principle of sovereignty was unanimously accepted; the two other competing theories being decisively rejected, *viz.*, the theory of the airspace being entirely free and the theory by which, upon the analogy of the maritime belt, there is a lower zone of territorial airspace and a higher zone of free airspace. Whatever objections of a legal nature one wishes to make to this principle of pyramidal sovereignty, it can safely be held that as long as the principle of sovereignty on the land is maintained in its present form, it will be maintained in the airspace above the land. The difficulties experienced in the present war in restricting violation of sovereignty in the air do not alter the fact that the principle of sovereignty in peacetime as well as in wartime is preferable to any other alternative.

If the authors of the Paris Convention of 1919 were convinced of the necessity of recognizing the principle of the sovereignty of the state over the land and territorial waters, they were not less convinced of the necessity of

proclaiming the airspace above the open sea as being entirely free. But what is the legal basis of this freedom? What does it involve and how can it be reconciled with the principle of sovereignty over the airspace above territorial waters and above the land? The freedom of the airspace above the open sea is derived from the freedom of the sea; their legal bases are the same; and it is to Grotius to whom we turn in the first place to find the justification of both principles.

Now the arguments of Grotius were of a two-fold nature, as well moral as legal, and it is curious to note that, whereas Grotius himself refuted in *De jure belli ac pacis* his main legal argument set forth in *Mare Liberum*, this same legal argument has still been used by some of the internationalists of the present time as a basis for the freedom of the air. In *Mare Liberum* Grotius contended that the sea by its very nature cannot be appropriated. In *De jure belli ac pacis* Grotius refuted his original argument that *by its nature* the sea cannot be occupied by remarking that, in the same manner as rivers, the sea appears capable of being made the property of the Power possessed of the shore on both sides of it. The only limitations for this possibility of appropriation being: not too much area as compared to the shore owned by the riparian state and no curtailment of the right of innocent passage. It is not through his legal arguments that Grotius has exercised his enormous influence, but through the moral aspirations of his theory that the whole earth is for all people and that the sea is the great means of making man participate in the totality of the earth.

The predominant reason underlying the freedom of the sea is that the sea is necessary to the communication of mankind. It is the common conviction that this international highway connecting distant lands should not be under the sway of any state whatever. The basis of the freedom of the sea is to be found in the common conviction that by withdrawing the sea from the imperium of states and by declaring the sea to be a common domain of communication for the community of states the interests of that community are best served.

The reasons given for the freedom of the sea are equally valid for the freedom of the air above the sea, but, if one bases the freedom of the air above the sea on the principle that the air is the natural means for communication necessary to enable man to participate in the totality of the earth, how can one reconcile the principle of state sovereignty over the airspace above the land with this general principle? Is this principle of freedom only valid for states bordering the oceans? Is not every state a border state of the air ocean and has not therefore every state a right to this freedom of communication? A tendency may be noted in discussions of the doctrine to pass lightly over these questions. This may perhaps be attributed to the incongruity between this principle and the principle—*not* of sovereignty as such—but of the *complete* and *exclusive* sovereignty spoken of in the Convention of 1919.

Does the sovereignty which the state exercises over the airspace above its

territory differ in kind from the sovereignty the state exercises over its land domain and its territorial waters? The question of the nature of the sovereignty of the state over the airspace came under discussion during the Hague Codification Conference of 1930. The following articles were accepted by the Conference:

Art. I. The territory of a state includes a belt of sea described in this convention as territorial sea.

Sovereignty over this belt is exercised subject to the conditions prescribed by the present convention and the other rules of international law.

• Art. II. The territory of a coastal state includes also the airspace above the territorial sea, as well as the bed of the sea and the subsoil.

Nothing in the present convention prejudices any conventions or other rules of international law relating to the exercise of sovereignty in these domains.

The following bases of discussion were proposed:

No. 1. A state possesses sovereignty over a belt of sea round its coasts; this belt constitutes its territorial waters.

No. 2. The sovereignty of the coastal state extends to the air above its territorial waters, to the bed of the sea covered by those waters and to the subsoil.

Whereas in basis of discussion No. 2 direct reference was made to sovereignty over the airspace, Article II, which was accepted, speaks in terms of territory, leaving it to be supposed that the question of sovereignty had incidentally been solved. Why did this happen? It was feared that from the basis of discussion it might be deduced that the sovereignty of the state over the air is the same as the sovereignty of the state over the water. This reasoning seems unsound because the nature of the sovereignty over the airspace above territorial waters is the same as the nature of the sovereignty the state possesses over the belt of sea along its coasts. The limitations upon these sovereignties, however, need not necessarily be the same. These limitations find their basis either in a treaty or in a rule of customary international law. For each of the two sovereignties one has to inquire whether there is a treaty or a rule of customary law limiting the power of the state. The treaties and these rules can of course be, and as a matter of fact are, different as regards the surface and the air. The limitations can therefore be, and in reality are, different also; but the nature of the sovereignty remains the same. The cause of the uncertainty in the minds of many delegates must be sought in the unfortunate wording of Article I of the Paris Air Convention of 1919, by which *complete* and *exclusive* sovereignty over the airspace was recognized. The intention of the authors of the Paris Convention was, however, to limit sovereignty over the airspace for each other's benefit by the freedom of passage. This intention is clearly expressed in Article II of the convention. The Italian delegate Giannini, therefore, rightly laid emphasis on the fact that the pleonastic form of Article I meant nothing at all.

As regards sovereignty over the airspace we conclude that it does not differ in kind either from the sovereignty which the state exercises over its land domain nor from the sovereignty of the state over its territorial waters. If it is true that sovereignty over the airspace is derived from the possession of the subjacent territory, this does not mean, however, that the extent of this sovereignty—the measure in which the sovereignty is limited by rules of international law—must be exactly the same as the extent of sovereignty over the land domain. These are separate questions. For each of the two sovereignties one has to ask the question: what are the rules of international law affecting this sovereignty?

Cavaglieri rightly observes that international practice appears to establish a common conviction of the states in favor of the principle that a state, member of the community of nations, is not permitted to forbid in an absolute way access to its territory either to all aliens or to the nationals of a particular state.²⁰ No state insists on its power, based upon the principle of unlimited sovereignty, to exclude all foreigners.

Are there any limitations on the sovereignty of the state over the airspace above its territory, or, to put this question differently, are there any treaties or customary rules of international law restricting the power of the state over the airspace?

In Article 2 of the Paris Convention of 1919, Article 2 of the Ibero-American Convention of 1926, and Article 4 of the Pan American Convention of 1928, the contracting states undertake, in time of peace, to accord freedom of innocent passage above their territory to aircraft of other contracting states. One of the fundamental ideas of the delegates at the Versailles Peace Conference was: "After having fixed the right of sovereignty, we have waived this right for each other's benefit, at least as far as freedom of passage is concerned."

The fact that the first two conventions recognize the possibility of states making conditional on their prior authorization the creation and operation of international airlines does not affect the basic principle by which freedom of passage is recognized. One may object, however, that practice has proven that states, basing themselves on this condition of prior authorization, have in many cases refused to grant freedom of passage, though this passage would not in any way have affected their vital interests. However true this may be, it does not alter the fact that if a state avails itself of the right given to it in such a way as to invalidate the freedom of passage provided for in the above-mentioned articles, it clearly violates one of the fundamental principles on which each of the three international air conventions is based; and it cannot but be considered surprising that actual cases of violation have not been more openly condemned.

Now as regards the situation where no treaty exists, as is the case, for example, between the United States and many of the European states. Does

²⁰ *Recueil des Cours de l'Académie de Droit International*, 1929, I.

there exist any rule of customary international law limiting sovereignty by the right of innocent passage? When answering this question, it should be borne in mind that custom is not limited to series of homogeneous acts but embraces also continuous common conviction although this conviction be not converted into acts. Uniformity of attitude of the states in the twenty years' existence of civil aviation and of their acts is not to be discerned; but, when one examines the doctrine of the last twenty years, one is struck by the measure of unity in the opinion of the authors proclaiming freedom of passage for air navigation and rejecting the arbitrariness of states in this domain.²¹ On a superficial view it may seem surprising that there is such a marked difference between the attitude of states and the doctrine of writers, but the explanation is not difficult to find. Whereas as a general rule the practice of states determines doctrine, this has not been the case in aviation, where thought about the rules which should govern air communications started before air communications actually existed.

The legal basis of the freedom of passage in the territorial waters of the state and in international rivers is found in the common consent of the nations that they should be able to communicate freely with each other in so far as this freedom does not affect their independence. The domain of the air constituting the greatest medium for communication of mankind, inexorable logic imposes the acceptance of the principle of freedom of passage for air communications on the same legal basis as that applicable to other international communications. However much practice, in various instances, may have departed from this principle, one is justified in maintaining that a common conviction is existent, according to which freedom of passage by air is a logical consequence of the general principle of freedom of international communications in territorial waters and in international rivers.

In the introduction to the present study it was postulated that the rules to govern air navigation should satisfy two primary conditions. They should further the development of air navigation as much as possible; but, as this development will necessarily lead to rivalries, the rules at the same time should be such as not to create a sense of injury or injustice which would cause rivalries to culminate in action by force.

As aviation overcomes the limitations of time and space which nature imposes upon man to a greater extent than in the case of shipping, the social element of aviation is necessarily stronger than that of shipping; and, from the social point of view, therefore, the call for freedom in aviation must be even more persistent than that for freedom in shipping. The reason why the awareness of the social element of aviation is not greater throughout the world is due to the fact that quantitatively air commerce has not yet grown sufficiently to have a pronounced influence upon public opinion.

The second element, the power element, influences freedom, both in eco-

²¹ Cf. the authors cited by Goedhuis, "*Le Régime juridique de l'espace aérien*," *Revue de Droit International et de Législation comparée*, 1936, No. 2, p. 384 et seq.

nomie and potential military aspects. As regards the economic aspect, if it has to be admitted that there is an identity of interests for all states in the existence of air communications, individual interests of the states may clash over the share which each state is to have in these communications. The reason why several states applied a restrictive principle in aviation was that, through their geographical position or otherwise, they expected to be able to secure for themselves a larger share in air communications or in the benefits arising therefrom than they would have been able to secure if freedom of passage prevailed. They may have known that by prohibitory regulations they hampered the building up of a world air net; they may even have realized that by obstructing air communications their own interests in having the best communications possible were injured, but this injury was in their eyes outweighed by the ultimate advantages they thought to reap, hoping that the other states would be forced to let them have a share in air communication greater than what they would have been able to receive otherwise. When considering the political aspect as it presented itself in 1929, Flandin, analyzing the attitude of the smaller states which were in favor of the restrictive principle, remarked that it seemed that these smaller states wished to make a present to the larger states with extended territories.

As regards the commercially stronger states, this category may be subdivided into:

- (1) The states not disposing of bases outside their own country which can be used as landing places.
- (2) The states having such bases at their disposal.

Considering those two subdivisions:

1. All commercially strong states, whether or not they dispose of airbases, will seek more and more scope for their energies in the air. The advantages of a state not disposing of airbases in having the possibility of using the airbases of other countries definitely outweigh the disadvantages they might suffer from having to compete with foreign airlines on their own territory.

2. It is for this category that the asserted common interest in freedom of air navigation is least apparent. The acceptance of this principle by the states falling under this category involves sacrificing certain *immediate* self-interests, but these sacrifices are required not only by ethical idealism—it is not reasonably to be expected that states will allow themselves to be guided exclusively by considerations of a moral order—but by political realism.

The analysis of the economic aspect of civil aviation leads to the conclusion that the ultimate interests of all states, whether large or small, whether economically strong or weak, require the acceptance of the principle that no state should forbid *for reasons of economic protection* foreign aviation to fly to, from or over its territory. The only exception to this principle, to be granted to each state, should concern the reservation of purely national traffic (cabotage) to its own airlines.

There remains to be considered the question as to the way in which the

attitude of states towards the civil aviation of other states will be affected by the potential military value of that aviation. In this domain a divergence exists between shipping and air navigation, though this divergence is not of a fundamental nature. Merchant shipping presents an instrument of potential military power, especially for ancillary services such as training, supply, and troop carrying; but civil aviation presents a much greater danger than merchant shipping as an instrument of direct aggression. Aircraft penetrate to the heart of the country, are more difficult to control and can strike swiftly. The aversion of certain states to open areas of military importance to the operation of foreign airlines is therefore understandable. If there exists an alternative route—even though this route may not be as favorable as the one leading over or in the military area—the closing of such area will not present a serious problem as it does not profoundly affect the course of world aviation. The situation takes on a different aspect, however, when the military area is indispensable as a basis for world airlines, as is the case with regard to several islands in the Pacific. Take the case where the state owning such an island wishes, for reasons of security, to close it as a base for all foreign civilian aircraft operations. Such action may increase the relative security of the island in question, but will it increase the absolute security of the state? When a particular base owes its importance to its control of a world highway, the problem of access to this base concerns the world; and sooner or later the world will probably revolt against a monopoly which obstructs the natural course of a channel of trade vital to the community of nations. A state realizing this fact may be inclined to open the base to the airlines of certain countries with which it entertains close relations. Although, from the viewpoint of communications, such partial opening is of course preferable to a monopoly of the state in question, from the point of view of general security this situation is even worse than the situation brought about by a general prohibition. The reason is that such discrimination between states on a point which may affect their essential interests will lead to political grievances, the seriousness of which will grow in proportion to the importance of the base for world air traffic. To be added to the political grievances are, of course, the retaliatory measures which will affect the aviation of the prohibiting state.

The security of an area of military importance which at the same time is indispensable as a base for world aviation should therefore, in the ultimate interests of the owner of the base as well as in the interests of the community of nations—be guaranteed by all possible means, except the one which leads to the prohibition of the use of the base by foreign air companies. It is clear that no useful purpose would be served in making at the present time any suggestions concerning the way of guaranteeing the security of the bases in question, as this problem is of course closely bound up with the general security problem which, at the end of this war, may have to be solved.

The discussions regarding the future status of the air will take place under

circumstances laden with memories of the destruction and sufferings caused by aviation in this war. A great effort will be needed in order that the vision of the future be not blurred by these memories and there result the failure to recognize the beneficent element in aviation, without which no stable basis for a constructive air policy can possibly be created.²²

It should never be forgotten that of the three elements—land, sea, and air—the last is the least national and nationalizable. For reasons both of ethical idealism and political realism there is no field of human activity for which the claim to freedom is more insistent than the field of the air.

²² E. H. Carr in *The Twenty Years Crisis*, 1940, gives a masterly analysis of the influence which the factors *power* and *utopia* should have on sound political thought.

INTERNATIONAL LAW AND COLOMBIAN CONSTITUTIONALISM

A NOTE ON MONISM

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I

In explaining the nature of international law, each of the two major schools of thought draws upon legal philosophy and practice for evidence in support of its interpretation. It is not the purpose of this note to offer any conclusions or proofs as to the validity of the reasoning of one or the other of the two schools. It would require more than the subject-matter here considered to prove the "Monist" position, or to detract from that of the "Dualist." However, inasmuch as state practice is one of the guides to the resolution of the debate on the nature of international law, it is hoped that an explanation of the attitude of the Colombian Supreme Court concerning the relationship of *pacta* to the national constitution and legislation of that state may merit mention.

The "Monists" base their monism on the argument that international law can and does, when necessary, determine the content of municipal law. In this connection, they rely much more heavily upon conventional than on customary law.¹ This is to be expected because the greater certainty of conventional law makes any conflict between it and municipal law more obvious and thereby enables one to assume his attitude towards such conflict with a minimum of misgivings as to his intellectual honesty or perspicacity.

There is an established doctrine in Colombian jurisprudence which is in harmony with the "Monist" position that in cases of conflict between provisions of an international treaty and provisions of municipal law, the treaty shall prevail.² In effect, this is a limitation on the doctrine of state sovereignty *vis-d-vis* international law. That is to say, the Colombian Supreme Court has refused to invalidate a treaty on the grounds of uncon-

¹ H. Kelsen, "*Théorie Générale de Droit International*," 42 *Recueil des Cours de la Académie*, (1932), 117-352, especially pp. 298ff. See also, J. L. Kunz, "The 'Vienna School' and International Law," 11 N. Y. Univ. Law Quar. Rev. (1934), 370-421.

² See, Hermann Meyer-Lindenberg, "*El control judicial de la constitucionalidad de las leyes*," 15 *Revista Javeriana*, (1941), 68-79, especially pp. 76-79.

Dr. Meyer-Lindenberg is Professor of International Law in the National University, Bogotá. The author wishes to acknowledge his indebtedness to Professor Meyer-Lindenberg whose tireless answering of questions enabled the author better to understand the problem under discussion.

Some evidence of at least the presence of this idea in U. S. jurisprudence is to be found in *Cook v. United States* (1933), 288 U. S. 102.

stitutionality. In fact, the court has refused even to decide the question of the unconstitutionality of treaties entered into by the Colombian Government. The practical effect of such refusal is to place the treaty above question. Any treaty signed by the Executive and approved by the Congress is the law of the land. Citizens may not question the constitutionality of the treaty in the courts. It is absurd to argue that the citizens may be protected by impeachment machinery against executive signature of unconstitutional treaties in view of the constitutional requirement of congressional approval as a condition precedent to ratification. Moreover, control of the Congress is the dubious one of "revenge at the next election." Therefore, for all practical purposes, in cases of conflict between a treaty and the Constitution, the treaty prevails because of the lack of a forum in which to question its constitutionality.

II

On April 6, 1914, there was signed at Bogotá a treaty between the United States and Colombia which provided, among other things, that Colombia recognize the independence of the Republic of Panamá. The Colombian Congress approved the treaty on June 9 of that year by Law No. 14.³ The United States Senate withheld its approval until April 20, 1921, and ratifications were not exchanged until the following year.⁴ It was under these circumstances that the validity of the treaty was questioned before the Colombian Supreme Court.

The Supreme Court of Colombia is charged with the "guardianship of the integrity of the Constitution." For the execution of such duty it is given the power "to decide definitively, . . . upon the validity of all laws or decrees questioned before it by any citizen whatsoever as unconstitutional."⁵ It was on the basis of this provision that General Carlos José Espinosa questioned the constitutionality of Law No. 14 of 1914 on the ground that it approved a treaty which contained provisions contrary to the national Constitution.⁶

In his complaint, General Espinosa cited twelve sources of conflict, none of which was really convincing or based on sound reasoning. However, it is

³ República de Colombia, *Leyes* (1914), p. 24.

⁴ U. S. Stat., Vol. 42, Pt. 2, p. 2122.

⁵ Art. 149, *Constitución Política de la República de Colombia*, p. 50 (Codification of 1936). The full text of the article is:

"The Supreme Court of Justice is entrusted with the guardianship of the integrity of the Constitution. Consequently in addition to the other powers conferred upon it by this [Constitution] and laws, it shall have the following power:

"To decide definitively, after consultation with the Attorney-General, upon the validity [*exequibilidad*] of legislative acts objected to by the Government as unconstitutional, or upon the validity of all laws or decrees questioned before it by any citizen whatsoever as unconstitutional."

⁶ Decision of July 6, 1914, 23 *Gaceta Judicial* (1915), p. 9.

unnecessary to consider or reconstruct the bases of his complaint. All that is germane to the problem at hand is the fact that the court was faced with the question of the constitutionality of a treaty duly denounced as repugnant to various constitutional provisions. Because the case was of this nature, the court refused to take jurisdiction.

The law involved in the case contained only one article. The remainder consisted of a reproduction of the treaty which it approved.⁷ The court interpreted the nature of the complaint as an action brought to question the constitutionality of various provisions of the treaty itself. That is to say, the court did not consider that the complaint, as presented, was a charge of unconstitutionality leveled at the sole article in the law.⁸

The court next considered the question of its jurisdiction in a case of this type. In General Espinosa's complaint it was said that the court had jurisdiction by virtue of a provision in the second paragraph of Article 149 of the Constitution which provides that the court has power to decide definitively on "all laws or decrees" questioned before it as unconstitutional by any citizen whatsoever.⁹ He contended that because of the generality of the term "all laws or decrees," the court could not properly escape jurisdiction by arguing that the law in question was of an exceptional nature and therefore did not fall within the jurisdiction of the court.

The court would not agree with this contention. It was of the opinion that although laws approving treaties went through the same procedure required for ordinary legislation, they nevertheless differed substantially. Ordinary laws are unilateral acts or expressions of the sovereign will and their entrance into force is completed by executive sanction and promulgation. On the other hand, laws approving treaties are merely the way in which one of the parties to the treaty manifests its consent to the provisions of a bilateral international pact. Such a law creates no legal situations or relations and its efficacy depends upon the consent of the other contracting party.¹⁰

⁷ "Sole Article: The treaty signed in this capital April 6th of this year between the Republic of Colombia and the United States of America is hereby approved." Then follows the text of the treaty. Law No. 14 of 1914, *loc. cit.*

⁸ "It is seen clearly then that the claim of invalidity is directed against the sole article of Law No. 14 of 1914 approving a treaty, and that the basis of such invalidity consists not in that this article is contrary to the fundamental charter, but in that some of the stipulations contained in said treaty not only violate the cited provisions of the Constitution but are repugnant to the spirit thereof. In other words, not the spirit of the law itself, *but the fact that it approves a treaty containing clauses which violate the National Constitution is challenged.*" *Loc. cit.*, pp. 10, 11; italics inserted.

⁹ For text, see above, footnote 5.

¹⁰ "Although the law approving a public treaty follows the same procedure required for ordinary legislative acts, there can be no doubt that for other reasons it differs substantially from ordinary laws. The latter are unilateral acts, expressions of the will of the sovereign which commands, prohibits or permits; the sovereign's sanction and promulgation completes them. The former [type of law] is an element of a complex juridic act; it is the

Moreover, as the court pointed out, the complaint was not based upon the unconstitutionality of the law, but rather on the unconstitutionality of some of the provisions of the treaty. Although the law is a necessary element of the treaty, the two should not be confounded. It is the treaty and not the law in which repugnance, if any, is to be found. Since this is the case, the court found that it had no jurisdiction under Article 149 of the Constitution to take cognizance of the question of the constitutionality of a treaty before the exchange of ratifications and therefore before any legal relationships or situations growing out of it had come to life. The court would have even less power to declare a treaty unconstitutional after the exchange of ratifications because this would be tantamount to the legal possibility of unilateral termination of a bilateral contractual obligation.¹¹

With reference to the court's obligation to guard "the integrity of the Constitution," it was pointed out that Article 149 states specifically what may be done to fulfill this obligation. There is no express statement concerning treaties in the article. The court felt that it did not have the right to take jurisdiction by implication because this would be a violation of the separation of powers principle, inasmuch as the Constitution gave the treaty-making power only to the President and Congress.¹² Since the court was given no express power to participate in the formation of public treaties, it cannot be admitted therefore that the validity of international pacts is subject to review by the court. This would be a violation of the separation of powers, and it would thereby constitute a violation

manner in which one of the high contracting parties manifests its consent to the stipulations of a pact essentially international; it does not by itself establish any legal relations and its efficacy depends upon the consent of the other contracting party if the latter on its part ratifies the clauses agreed to by the negotiators." *Loc. cit.*, p. 11.

¹¹ "Even less would the court be able to declare the unconstitutionality of a treaty after the exchange of ratifications; since the agreement is between two states, it would not be possible for one of them even through its highest tribunal to break the contractual bond, which would be equivalent to declaring unconstitutional and therefore without obligatory force a law that it had approved." *Loc. cit.*, p. 11.

¹² The President is authorized to make treaties, with the approval of the Congress. Art. 116 of the Constitution in part provides: "The President of the Republic shall have power . . . to negotiate [*celebrar*] with foreign Powers treaties and conventions which shall be submitted to Congress for approval."

Art. 69, Sec. 19 provides: "Congress shall have power . . . To approve or disapprove treaties which the Government negotiates [*celebre*] with foreign Powers."

The constitutional basis for the doctrine of separation of powers is found in Art. 57 of the Constitution of 1886 which provides: "All public powers are limited, and they are separately exercised in respective functions."

(Unless otherwise indicated, all constitutional citations are to the codification of 1936. When this case was decided (1914), the Constitution of 1886 and certain subsequent amendments were in force. Since all provisions cited, except the one immediately above, are still in force, it is thought that use of the 1936 codification would facilitate reference. However, the text of the Constitution of 1886 is found in said codification beginning at p. 73.)

of the "integrity of the Constitution" which the court is charged to guard.¹³

In fine, the court refused to consider the charge of unconstitutionality of the treaty on two grounds. In the first place, Article 149 did not specifically give the court jurisdiction over laws approving treaties, and because of other constitutional provisions the court felt such jurisdiction could not be founded on an implied power. In the second place, to declare a treaty void would be a unilateral vitiation of a norm which owes its juridic nature to the existence of bilateral agreement and consent. The court clearly indicated that it thought such an action would be contrary to the nature of treaty law and therefore contrary to the true nature of the judicial function.

Sixteen years later (1930) another case involving the constitutionality of a treaty was brought before the court. The court again refused to take cognizance of the case for the same reasons adduced in the decision of 1914 discussed above.¹⁴

Also in 1930 a case relevant to this discussion was before the court. Señor Luis María Holguín questioned an Act of Congress concerning the public credit (Law No. 23 of 1918) on the ground that it conflicted with Law No. 35 of 1888 approving a treaty: the Concordat of 1887, which provided for payment of public money to certain ecclesiastical institutions and individuals.¹⁵ Here is a question of the incompatibility of an ordinary law with one approving a treaty. In view of the other decisions discussed, it might be expected that the court would refuse to take cognizance of the matter because this would necessitate judicial review of a law approving a treaty. However the court did take jurisdiction of the case.

The Concordat of 1887, approved by Law No. 35 of 1888, vested in certain institutions and individuals the right to receive payments from the public treasury. In 1918 Congress passed a law (No. 23) which altered the nature of the money payable so that the payees suffered a financial loss and therefore a damage to their rights under the concordat. In view of the fact that the court had so clearly committed itself in 1914 to the doctrine of the unreviewability of treaties or legislation approving them, it was necessary to resort to other means to justify the court's enforcement of treaty provisions. It did so by making use of Article 31 of the Constitution of 1886.¹⁶ It

¹³ "... and finally, if in the light of elemental principles it cannot be admitted that the validity and efficacy of international pacts are subject . . . to the decision of a single high contracting party, it is necessary to conclude that the court may not uphold the claim brought against the treaty of April 6th of this year, because it lacks jurisdiction." *Loc. cit.*, p. 12.

¹⁴ Decision of Dec. 6, 1930, 36 *Gaceta Judicial* (1930-1931), p. 248.

¹⁵ Decision of Nov. 18, 1930, 36 *Ibid.*, p. 233.

¹⁶ "Rights acquired by natural or juridic persons in accordance with law [*leyes civiles*] may neither be denied nor modified by subsequent laws.

"Whenever the execution of a law enacted for reasons of public utility results in a conflict between individual rights and the [public] necessity recognized by the law itself, private

concluded that the rights created by the concordat were private or personal rights, and, therefore, according to Article 31, they could not be invaded by subsequent legislation except for motives of public purpose and then only with full compensation. There was no evidence of public purpose and there was no provision for compensation; therefore, the court found that the 1918 law violated Article 31 of the Constitution which offered protection to rights acquired under the concordat. The court specifically said that any private rights arising out of a treaty are included in those protected by Article 31 of the Constitution.¹⁷

It is not important that the concordat provisions were protected by the court. For the purposes of this discussion the significance of the case lies in the fact that the court was willing to find a way to enforce a treaty by protecting it against subsequent incompatible legislation. In Colombian jurisprudence, subsequent conflicting ordinary legislation does not supersede treaty provisions.¹⁸

III

Whatever else "Monism" means, it includes the idea that international law, being superior to municipal law, takes precedence over the latter when in their operation they come in contact with each other. The proponents of this school of thought deny that a state has any right to impair the full operation of international law, especially conventional law, by unilateral action such as the enforcement of conflicting municipal law.

The "Monist" position is neither accepted nor rejected here. The whole purpose of this note is to discuss an element of Colombian jurisprudence which seems, in practical operation, to conform somewhat to "Monist" theory that international law does and should take precedence over municipal law.

Due to the pattern and provisions of the Colombian Constitution, the Supreme Court of that republic has denied itself jurisdiction over the question of the constitutionality of treaties. As pointed out above, this denial closes the only practical forum for the question. It would be useless to take such a question to the President or Congress. Moreover, the court

interest should give way to public interest. *But the expropriations which it may be necessary to make must be fully indemnified in accordance with the following article.*" *Loc. cit.*, p. 79; italics inserted.

¹⁷ "A public treaty is a pact creative of rights and obligations between the parties which enter into it and approve it by legislation. . . . If these rights are of a private [*civil*] nature, they are protected by the article [31] of the Constitution, and consequently, when a law violates them, any citizen whatsoever . . . may complain of such violation." *Loc. cit.*, p. 236.

¹⁸ See, Decision of June 13, 1925, 31 *Gaceta Judicial* (1924-1925), p. 248.

In this case the court said, ". . . it is a principle of public law that the Constitution and public treaties are the supreme law of the land and their provisions prevail over ordinary legislation which is in conflict, even if the legislation is of later date." (p. 250)

has held that Congress cannot undo a treaty by subsequent legislation. Therefore, as long as a treaty is in force, it determines to a certain extent what will be the content of Colombian municipal law.

Although the court will not consider the question of constitutionality, it has shown itself willing to protect and enforce rights born of treaty provisions when such rights are jeopardized by municipal legislation. This also indicates that as long as a treaty is in force it will determine the content of Colombian municipal law. In short, once the parties have agreed¹⁹ to a treaty, it is above the Constitution in that the court will not decide questions of repugnancy; it is above legislation in that legislation may neither modify nor jeopardize treaty rights.

One feels reasonably justified in believing that this Colombian quasi-"Monism" is not the result of the Supreme Court's admiration for the dogma of the "Vienna School." In the first place, the doctrine was established in Colombian jurisprudence before there was a "Vienna School." In the second place, there are certain practical political considerations for the court's adoption of this interpretation of the nature of treaty law. It is to be remembered that Article 149, paragraph 2, of the Constitution²⁰ gives "any citizen whatsoever" the right to test the constitutionality of laws and decrees. The complainant does not have to be a party in direct personal interest. All he need be is a citizen of Colombia. Therefore, persons in opposition to the government's foreign policy could be extremely embarrassing to the government if the court were open to them for the pursuit of dilatory tactics.

¹⁹ It is to be remembered that the court has clearly indicated that mere agreement is sufficient. The exchange of ratifications is not necessary to this situation.

²⁰ For text, see above, footnote 5.

EDITORIAL COMMENT

A PATTERN OF WORLD ORDER

In the forced coöperation of states during the present war it may be that the rudiments of a world organization are appearing. It is perhaps timely to set down some of the elemental facts of concerted action, not purely military in character, emerging from the struggle.

The official statements on war and peace aims by leaders in both camps since September 1, 1939, bring out their diverse views as to a future world or regional order.¹ Glittering plans are dangled before a suffering world, but through all of them runs a thread of essential desire for an organized Europe to prevent another war and to repair the devastation of the present war, around which or on the model of which an international organization might be created. There was expressed, however, the feeling that this could not be accomplished by the stroke of a pen, that it would require a gradual growth over a long period, perhaps 50 or 100 years, to bring it to fruition. So many problems, so much traditional rivalry and animosity, so much distrust and fear, so much reluctance to surrender or equalize rights and advantages, so much devastation and sacrifice of life and property with its psychological effect, so much indoctrination of incompatible ideas—so much of these things, and others not mentioned, to be overcome, repaired and forgotten that a settled dispassionate organization could not be arrived at for a generation or two. Is it conceivable that these things will be melted into a stable alloy by the fires of war?

However this may be, the necessities of war, like the necessities of politics, associate together queer comrades in misery. The coöperation forced upon the belligerents in this war has shown how supposedly incompatible nations can work together if there is a common will and a common interest. There is nothing strange in the alliance of the totalitarian Powers who worship at the altar of force, except that Russia is now opposed while Finland is not. But it is interesting to note on the other side that the democracies are coöperating wholeheartedly with communist Russia. Hitler has proved to Russia that her security depends in part on the democracies, and to the democracies that there is a danger to civilization greater than communism. He has demanded social justice among nations.² It has been widely thought that the inability of countries with different ideologies of government and life to coöperate was a great stumbling block to world organization. If those ideologies be stripped of their crusading spirit, are they essentially different in international effect from other theories of government which have flowered and faded in past centuries? If Germany, Italy and Japan want to go

¹ See Official Statements of War and Peace Aims, Geneva Research Center.

totalitarian within their own borders why should the democracies care? Ideas of government must be able to stand and survive on the base of their individual virtues, assuming they do not disturb the peace.

After discounting the propaganda and political value of official statements and declarations, it undoubtedly is true that the Nazi allies at home and in the conquered states suppress political freedom and individual liberty, cultivate brute force and arrogance, and seek domination and military power. They would sweep away the checkerboard of sovereign states in Europe and create a new Europe with Nazis in control of every important function. This they have already begun. The same ambition is entertained by Japan for the "Co-prosperity Sphere" in Greater East Asia. On the other hand, the United Nations envisage a Europe of coöperating free states, with a central organization having the authority and power to supervise matters of common concern to the end of freeing intercourse—commercial, financial, and economical—from restrictions, to enforce rule by law and to maintain peace. It is obvious that the two plans have certain fundamentals in common, but split on the rock of human rights.

Perhaps the first plan of post-war coöperation was that announced by Great Britain and France on March 28, 1940. They agreed not to make peace separately and not to discuss peace terms until they had agreed between themselves on the conditions necessary to ensure a guarantee of their security. They further agreed to continue after peace "a community of action in all spheres for so long as may be necessary to safeguard their security and to effect the reconstruction, with the assistance of other nations, of an international order which will ensure the liberty of peoples, respect for law and the maintenance of peace in Europe."² They regarded this amalgamation of resources as the cornerstone of the economic reconstruction of Europe, a nucleus around which the other nations might be able to assemble.

A more dramatic instance of proposed coöperation in this war was the British offer of union with France on the eve of her fall in June, 1940. This offer, made *in extremis*, envisaged a joint Franco-British Union, with a joint war cabinet in control of the armed forces of both, joint citizenship for their subjects, the amalgamation of their parliaments, and joint organs of defense, foreign, financial and economic policies. France, perhaps unfortunately, declined the offer, but the fact that it was made at all and in good faith is the surprising thing.³

Another effort at collaboration in war and peace was the Inter-Allied

² As early as Nov. 17, 1939, Great Britain and France had set up a coördinating committee limiting the right of free decision in certain domains, including the value of their currencies or the volume of their imports. France regarded the conception of free states, equal in rights and willingly restricting their sovereignty, as the absolute antithesis of *Realpolitik*. It excluded belief in the myths of the *Herrenvolk* and the *Lebensraum*.

³ The Polish and Czechoslovak refugee governments made a joint declaration Nov. 11, 1940, on the necessity of establishing after the war a "closer political and economic association" as a basis of a new order in Central Europe.

Meeting held at London, June 12, 1941, between representatives of the British nations, including India and Burma, and the refugee governments, including the Free French. After formal statements of aims and aspirations by various representatives, they adopted unanimously the following resolution:

- (1) That they will continue the struggle against German or Italian oppression until victory is won, and will mutually assist each other in this struggle to the utmost of their respective capacities;
- (2) That there can be no settled peace and prosperity so long as free peoples are coerced by violence into submission to domination by Germany or her associates, or live under the threat of such coercion;
- (3) That the only true basis of enduring peace is the willing coöperation of free peoples in a world in which, relieved of the menace of aggression, all may enjoy economic and social security; and that it is their intention to work together, and with other free peoples, both in war and peace to this end.⁴

Mr. Eden, the British Secretary of State for Foreign Affairs, hoped that this meeting might represent the beginning of a "new phase of collaboration and form part of the machinery through which victory will be won and by which peace will be maintained after victory."⁵ Will not these same nations feel coerced in a Europe set-up under the guns of the victors?

On August 14, 1941, came the so-called Atlantic Charter, a joint pronouncement by Mr. Roosevelt and Mr. Churchill, of "certain common principles" of national policy "on which they base their hopes for a better future for the world."⁶

⁴ The United Kingdom was represented by Mr. Churchill, Mr. Eden and several other members of the cabinet; the Dominions by their respective High Commissioners; India and Burma by the Secretary of State for India and Burma; the refugee governments in most cases by a Prime Minister and Minister for Foreign Affairs. The Greek representative declared at this meeting that the exchange of populations with Turkey, harsh though it was, had facilitated the establishment of peace and friendship between the two countries.

⁵ On April 22, 1942, the United States, Argentina, Australia, Canada and the United Kingdom signed a memorandum of agreement regarding international trade in wheat and setting up an international pool of 100,000,000 bushels for relief purposes in stricken areas as soon as possible. Attached is a provisional convention relating to post-war control of production, stocks and export of wheat. New York Times, July 2, 1942.

⁶ They declared for—

- (1) "No aggrandizement, territorial or other" for themselves.
- (2) No territorial changes contrary to the "freely expressed wishes of the peoples concerned."
- (3) "The right of all peoples to choose the form of government under which they will live," and the restoration of "sovereign rights and self-government" to those "forcibly deprived of them."
- (4) "With due respect for their existing obligations, to further the enjoyment by all States . . . of access on equal terms to the trade and to the raw materials of the world which are needed for their economic prosperity."
- (5) "Fullest collaboration between all nations in the economic field with the object of securing for all improved labor standards, economic advancement and social security."
- (6) "A peace which will afford to all nations the means of dwelling in safety within their own boundaries" and living "in freedom from fear and want."

Commenting on these principles generally, it is painful to note the absence of any reference to the peaceful settlement of disputes or to an international court or some other substitute for the processes of force. They are perhaps assumed, in view of existing agencies of this sort, but there is wide opportunity to make them more effective. Neither is there any reference to legislative or administrative machinery which, though in the past primitive and piecemeal, is necessary to promote, and handle problems of, international trade, finance, health, etc. Nothing either is said about the methods of financing such institutions as well as the suggested military effort to maintain world order. Finally, the matter of colonies and the position of mandates are conspicuous by their absence, perhaps naturally so. On the whole, it may be said that the charter is a pretty vague and inadequate statement of fundamental considerations of international peace and order.⁷

To the declaration regarding aggrandizement and territorial changes, the Nazi retort will be: Of course these countries have no desire to add to their territories when they control most of the land of the globe, and certainly they would not consent to territorial changes. No proposal is made for peaceful change. How will changes be made to accommodate the expansion of prolific and overcrowded races or the migration of peoples? It is conceivable that in the future such changes will have to be made or population growth be regulated internationally.

The charter further declares for the right to choose the form of government and the restoration of sovereign rights and self-government where lost. These envisage a continuance of the present system of sovereign independent states. With a few exceptions nothing is said about limitations of sovereign rights for the general good, such as compulsory settlement of disputes, treatment of minorities, guaranty of the essential freedoms, or restriction of unfriendly activities.

(7) "Such a peace should enable all men to traverse the high seas and oceans without hindrance."

(8) All nations "must come to the abandonment of the use of force"; "the disarmament of such nations" as threaten aggression "is essential" pending "a wide and permanent system of general security"; "all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments."

President Roosevelt later added that these "principles include of necessity the world need for freedom of religion and freedom of information."

⁷ Some of these omissions have been supplied and carefully discussed by Secretary Hull in his epochal address of July 23, 1942, on post-war conditions and aims, which is too long to summarize. Along with the establishment of an International Court, he advocates "surveillance over aggressor nations until such time as the latter demonstrate their willingness and ability to live at peace with other nations."

Under Secretary Welles, in his Memorial Day address of last spring, said: "Our victory must bring in its train the liberation of all peoples. Discrimination between peoples because of their race, creed, or color must be abolished. The age of imperialism is ended. The right of a people to their freedom must be recognized. . . ." Dept. of State Bull., May 30, 1942, Vol. VI, p. 485.

Asst. Secy. Berle, in summarizing the Atlantic Charter, stated that "it outlaws imperialism. The era of attempted domination must end." *Ibid.*, Jan. 17, 1942, Vol. VI, p. 63.

The declaration as to access to trade and raw materials is so weak and limited as to be almost meaningless. How can progress in this direction be made "subject to existing obligations." The Empire obligations of the British nations and possessions would apparently be excepted. Real access to natural resources and manufactured articles would certainly require a revamping of existing obligations. This access is apparently to be a matter of bargaining on the basis of need. The promise "to further the enjoyment" of access is not a large or definite commitment.

The "fullest collaboration" toward social justice, like the preceding, runs head on against the theory of domestic questions within the exclusive competence of the local government, although this has been to an extent circumvented by the International Labor Office. Presumably this organization will be developed and expanded or similar ones created.

The principles of safety of nations within their boundaries and freedom to traverse the seas are little more than high-sounding platitudes. What do these threadbare phrases mean? Do they contemplate a world organization which will afford safety from aggression at home and interference on the seas? Freedom from fear and freedom from want verge on impracticable but pious aspirations.⁸

The abandonment of force, the disarmament of aggressors and the reduction of armament are incongruous principles except in the sense of a progressive application. It is difficult to see how the first and third can be accomplished at the same time as the second. It is also noted that nothing is said about self-defense in connection with the abandonment of force. Presumably there will be no need for self-defense where aggressors are disarmed and force is abandoned. It is, however, not enough to prevent aggression or use of force; removal of the cause or motive will also be necessary for the maintenance of peace, and this will have to be done before it ends in forceful action.

Shortly after the advent of the Atlantic Charter a second Inter-Allied Meeting was held in London, September 24, 1941. The representatives, including those of Soviet Russia then at war with Germany, agreed to a resolution adhering "to the common principles of policy set forth in that declaration [Atlantic Charter] and their intention to cooperate to the best of their ability in giving effect to them." In the course of the meeting, however, the Dutch Foreign Minister pointed out with emphasis the unsatisfactory phraseology of Article 4 of the Charter which appeared to be in the nature of reservations. He indicated there should not be important exceptions to the

⁸ President Roosevelt gave his interpretation of these terms in his message of Jan. 6, 1941. See also Under Secretary Welles, address of Oct. 8, 1942, and *The Conditions of Economic Progress*, by Colin Clark. Compare with Vice President Wallace's symbolic suggestion that "the object of this war is to make sure that everybody in the world has the privilege of drinking a quart of milk a day." There is not freedom from want among our own ill-fed, ill-clothed and ill-housed countrymen. An economic millennium appears to be implied.

principle of access to trade and raw materials. "We shall all have to do away, to some considerable extent, with measures designed to protect existing economic units . . . otherwise this fine principle . . . would degenerate into a fine phrase." After further discussion, they adopted a second resolution in respect of securing supplies, food, raw materials and articles of prime necessity for the post-war needs of the captive countries. Collaboration for this purpose was planned, including preparation of estimates of the kinds and amounts of materials and the use of shipping resources therefor. A bureau is to be established by the British Government with which other governments can collaborate in framing estimates and which would make proposals to an Inter-Allied Committee for action. This was deemed by the French spokesman as carrying out Article 5 of the Charter. The Russian representative reserved as to the bureau. He thought it should be Inter-Allied and not British.

The principles of the Atlantic Charter were solemnly reaffirmed in the grand military alliance known as the Declaration by United Nations of January 1, 1942, signed by 26 nations:⁹ "Each government pledges itself to coöperate with the governments signatory hereto and not to make a separate armistice or peace with the enemies." They in effect pledge victory over their enemies as "essential to defend life, liberty, independence, and religious freedom and to preserve human rights and justice."

We have, therefore, in the Atlantic Charter a statement of principles and in the Declaration a further statement of human freedoms and rights, to both of which 30 nations are committed for post-war guidance and achievement. However, the unpredictable situation of the nations of Europe and Asia after the war is a serious impediment to any planning for the future.

The principles of the Atlantic Charter were still further subscribed in a series of Lease-Lend Agreements, now known as Mutual Aid Agreements, entered into during the last eight months between the United States and ten of the same countries, including Russia and China, which joined in the United Nations Declaration.¹⁰ These agreements also tie the international commitments a bit tighter. While in the main they are agreements as to the terms and conditions of the mutual aid given in resisting aggression, the parties at the same time declare "that they are engaged in a coöperative undertaking, together with every other nation or people of like mind, to the

⁹ These include the United States, Russia, China, the British Commonwealth of Nations and India, the eight conquered states of Europe and nine Central American and Caribbean Republics. To these Brazil, Mexico, Ethiopia, and the Philippine Commonwealth have since been added. It is said that these nations represent nearly two-thirds of the population of the globe and more than two-thirds of its economic and military power. *New York Times*, Jan. 4, 1942.

¹⁰ The Norwegian agreement contemplates a further agreement as to the continuance of assistance by the United States, after the invader has been driven out, in order to maintain peaceful conditions in Norway.

end of laying the bases of a just and enduring world peace securing order under law to themselves and all nations."

It is further provided in Article 7 that the terms and conditions of the final settlement of the lease-lend obligations will aim not to burden commerce but to promote the expansion of production, employment, and the exchange and consumption of goods, to eliminate discriminatory treatment in commerce, to reduce tariffs and other trade barriers and, in general, to attain all the economic objectives set forth in the Atlantic Charter. At an early convenient date conversations will begin to determine the best means of attaining these objectives. In short, the signatories have "joined in a determination to take practical measures to create a better world hereafter." It may be observed that Article 7 appears to modify in some respects Point 4 of the Charter and to bring the latter within the realm of useful accomplishment.

The fact that Russia has agreed to coöperate in the economic fields mentioned is of outstanding importance. Such a break in her 25 years of more or less closed economy may open the way to unpredictable effects internally as well as externally.¹¹

Of Article 7, President Roosevelt said in his last lease-lend report to Congress:

By this provision we have affirmatively declared our intention to avoid the political and economic mistakes of international debt experience during the twenties.

A lend-lease settlement which fulfills this principle will be sound from the economic point of view. But it will have a greater merit. It will represent the only fair way to distribute the financial costs of war among the United Nations.

The real costs of the war cannot be measured, nor compared, nor paid for in money. They must and are being met in blood and toil. But the financial costs of the war can and should be met in a way which will serve the needs of lasting peace and mutual economic well-being.

All the United Nations are seeking maximum conversion to war production, in the light of their special resources. If each country devotes roughly the same fraction of its national production to the war, then the financial burden of war is distributed equally among the United Nations

¹¹ Russia had already made a Treaty of Alliance, May 26, 1942, with England which in the first part confirmed the military agreement of July 12, 1941 and in the second part defined their relations after the war and provided for their collaboration with other countries along the lines of the Atlantic Charter. They agreed to work together for the "organization of security and economic prosperity in Europe," not seeking "territorial aggrandizement for themselves" nor "interference in the internal affairs of other states." Both desired "to unite with other like minded states in adopting proposals for common action to preserve peace and resist aggression in the post-war period," and "to render impossible a repetition of aggression and violation of the peace by Germany" or her associates in Europe. If either party be again attacked, the other party will give "all the military and other support and assistance in its power." Molotoff's Report to Supreme Soviet, June 18, 1942, New York Times, June 20, 1942. For text of the treaty, see this JOURNAL, Supp., p. 216.

in accordance with their ability to pay. And although the nations richest in resources are able to make larger contributions, the claim of war against each is relatively the same. Such a distribution of the financial costs of war means that no nation will grow rich from the war effort of its allies. The money costs of the war will fall according to the rule of equality in sacrifice, as in effort.¹²

This review should not close without mention of the important coöperative system established in the Western Hemisphere years ago, but greatly expanded and strengthened since the beginning of the war. The inter-American system is founded on sovereign equality, liberty, peace, and joint resistance to aggression. "It constitutes the only example in the world today of a regional federation of free and independent peoples. . . . It should constitute a cornerstone in the world structure of the future."¹³

With the Pan American Union as the nucleus of the organization and the seat of a permanent secretariat, the American Republics have set an example of regional coöperation of independent states which has worked well. They have adopted and acted on the fundamental principles that every act affecting the peace and security of America affects each and every one of them, and conversely that any attempt against the integrity and inviolability of the territory, sovereignty or political independence of one is an act of aggression against all. They have initiated peaceful processes of settling disputes, and through periodic conferences and intermediate meetings they have developed a procedure of consultation on matters of grave concern. Consequently under the stress of the present war, meetings of their Foreign Ministers have been held almost annually to consider matters of common defense, neutrality, territorial transfers during the war,¹⁴ foreign intervention and subversive activities, problems of refugees and immigration, and various other matters. They have organized special commissions to study and draft plans of economic and financial collaboration in directions too numerous to mention. Here is an international coöperative system in action which deserves study in connection with post-war planning.

L. H. WOOLSEY

THE PLACE OF FORCE IN INTERNATIONAL LAW

In response to the popular yearning for an ordered life, now that the horrors of war are upon us, individuals and societies are devoting their attention to the so-called improvement of international law.¹ Believing the shortcomings of international law in some way to blame for the current débâcle,

¹² For a detailed exposition of the meaning and implication of Art. 7, see address of Asst. Secy. Dean Acheson, July 6, 1942. Dept. of State Bull., July 11, 1942, Vol. VII, p. 614.

¹³ Under Secretary Sumner Welles, address of May 30, *supra*. The United States has signed limited lease-lend agreements with 16 American Republics who have declared war on or broken relations with the Axis Powers.

¹⁴ See the convention signed July 30, 1940, this JOURNAL, Supp., Vol. 35 (1941), p. 28.

¹ See, e.g., comment by C. G. Fenwick in this JOURNAL, Vol. 36, p. 446; draft of Grotius Society on "The Future of International Law," *ibid.*, p. 451.

they naturally think in times like this of proscribing the use of force by single nations² and vesting authority to wield force exclusively in some central organ, which, presumably with the aid of the good members, shall coerce into obedience the recalcitrant member States.³ Says the Grotius Society: "Without enforceability by appropriate organs, international law will continue to be defied with impunity."⁴

These assumptions and postulates, in the opinion of this editor, are not only without foundation in the world of facts, but if pursued, can lead only to further disappointment and disintegration of human society. The assumption, however pleasant, that State force can be proscribed by fiat and community force substituted, overlooks the fact that the national State is the unit—a highly competitive unit—of the international constellation and is likely to remain such for some time to come; that the existence of a complex of States with theoretical, if not actual, equality conditions the scope and the limitations of the law that can prevail—it cannot be imposed—among such a group of nation-States; that law controls but a small and by no means the most significant segment of international relations, which find their source in human needs and ambitions; that the forces and factors that motivate masses of people organized as nations are biological, economic, social, psychological, historic and not legal in character; that until their needs and ambitions can be considered, let alone met, on the levels in which they arise, *i.e.*, until scholars cease to ignore the provocations to force, it is idle to proscribe the manifestations of force; and until attention is diverted from symptom to cause, progress will be less than slow.

Turning now to the effort to institute community or group-force in place of nation-force, the existence of nation-States also conditions this intellectual invention. (It is not easy to subject politics to legal control and it is not apparent how numerous nations can be compulsorily disarmed. The individual within the State can be controlled because he has no arms, no opportunity to resist the central authority, and must submit to societal agents. This mature system of municipal law is conceived by some to be the only system that deserves the name of law; they therefore seek by rather far-fetched and inappropriate analogy to create for nation-States what they call a central community authority and then to endow it with the instruments of coercion. Both efforts are misguided and tend to impair what little understanding and accord we have in international relations and international law.

² See, *e.g.*, Fenwick, *supra*: "The law of force must be repudiated" (p. 446); "An act of force or violence directed against any member of the international community constitutes an international crime, and it is to be regarded not only as a crime against the victim of the attack but against the entire community and against each and every member of it" (p. 446).

³ "These measures may be military, or economic, or social, according to the nature of the case; but they must be such as will afford adequate protection to the State attacked, and justify it, if it should so decide, in not attempting to defend itself by force. All States are obligated to take part in these measures of coöperative defense, to the extent of the means at their disposal." Fenwick, *supra*, p. 446. ⁴ *Ibid.*, p. 451.

The devices suggested, however noble in aspiration, ignore and break down the inexorable premises of international law—~~the limits of the achievable~~—and by arousing in the disfavored the fear of possible destruction at the hands of fellow-members, frustrate that sense of trust and willingness to surrender the prerogatives of sovereignty on which alone the growth of international organization must rest.¹¹ In other words, ~~the threat of community or group-force~~ spoils any chance of an intelligent coöperation. A coercive central authority presupposes either a Pax Romana, which would signify the end of the national State, or a voluntary surrender of the indicia of sovereignty, including armies and tariffs, etc. But such voluntary surrender will be unobtainable so long as the threat of group-force hangs over States not in control of the instruments of centralized power, or so long as it implies national disarmament. Indeed, the quest for self-sufficiency, with all that it implies, is likely for some time to become more keen than ever.)

The Grotius Society admits that municipal law and international law are different in their origin, application and enforcement, but like those who admit that international law is a primitive system, they fail to draw the necessary conclusion from their premise and insist instead upon supplying what they consider the missing link by converting international law into a coercive system. As already observed, this is ruinous and utterly inconsistent with the subject-matter, national States. It takes us from the frying pan into the fire. To emendate the Grotius Society formula, it is believed that "without enforceability by appropriate organs, international law is not now defied with impunity"; but the mere attempt to supply organs of enforcement will, it is believed, cause revolts from the system, defiance, counter-alliances and more wars, certainly so long as the victims to be coerced and castigated are in possession of arms. (The whole effort to "enforce peace," a contradiction in terms, rests in a confusion of mind, and will, it is believed, continue to end in a morass of failure. It marks the road to war, not peace. It remained for the 20th century to develop this unfounded idea, which lies at the root of most of the schemes now circulating. Perhaps it symbolizes "the lost peace," to use Harold Butler's term.)

It is submitted as axiomatic, as premises which post-war planners cannot afford to ignore: (1) that the nature of the national State in a world of nation-States is such that the competition among them for place, power and prosperity calls for a high-calibre conciliation of conflicting interests, not for commands or ostracism; (2) that only by persuasion and acknowledged self-interest and not by force can the disparate States of the world be induced to create those international economic and social agencies which must help to temper, reconcile, and adjust the unfair competition which distinguishes the international life and conduct of States; (3) that law plays only a minor part in international social control and that international law cannot be endowed with the instrumentalities and machinery of municipal law; (4) that the re-creation of an atmosphere of harmony, trust and mutual respect is indis-

pensable to social order and that the threat to "enforce peace" among a group of equals is inconsistent with such an atmosphere; (5) that war in most cases is not an international crime but a social disease which has afflicted mankind from the beginning of history, and that for its eradication or dilution there is a crying need for economic and social physicians and not for political theologians.)

EDWIN BORCHARD

THE RENOVATION OF INTERNATIONAL LAW

The fortress of international law has been threatened more by the weakness of its defenders than by the strength of its enemies. There will always be lawbreakers. There will always be ways of "getting around the law" with the help of clever and unscrupulous politicians and lawyers. But there will always be law. The fortress may be beleaguered and weakened, but it is impregnable. Its natural strength is great, and it will never lack defenders. The defenders of international law have put up a poor defense, either because they have not sufficiently valued its treasures, or because they have not properly understood the strength of its defenses: its outer approaches and inner bastions.

Among the heterogeneous band of untrained and undisciplined soldiers in the citadel of international law are to be found those who, like the monks on the walls of Constantinople when it was captured by the Turks, are more interested in theories and abstract speculations than in strengthening its resources and powers of resistance. Among its defenders are to be found many sincere crusaders who wish to reform the world but lack the proper equipment and training. And there are lawyers who are not convinced that the law of nations is entitled to defense as pure law.

Concerning the political theorists who delight in abstract speculations, it may be said that they have shown great erudition and acumen in their analysis of international law. Like Byzantine logothetes, they have fenced over fine legal distinctions. They have been greatly concerned about natural law, whether it was the source of, or identical with, the law of nations. They have disagreed concerning the nature of the *jus gentium*. They have spun gossamer theories about the nature of sovereignty and international personality. They have theorized acutely on the subject of the status of the individual as the *object* and not the *subject* of international law. They have broken their lances on the question whether recognition *creates* or simply *acknowledges* the legal existence of new states. They have made subtle distinctions and classifications concerning different kinds of international law, whether "voluntary," "positive," "conventional," "public," or "private." International law has been a marvelous battleground, or playground, for the political theorist, but the results have been rather to weaken than to strengthen the inner defense of the fortress. Fauchille has this to say regarding the theorists and the glossateurs.

Le droit scientifique élaboré par les publicistes et par les jurisconsultes ne peut acquérir une valeur sérieuse qu'en s'harmonisant avec la situation réelle des États et des nations. Et cette situation est la résultante de faits historiques, de traditions, de lentes évolutions, qu'on ne saurait ignorer sans s'exposer aux plus graves erreurs. Pour avoir méconnu ces faits et ces traditions, d'excellents esprits ont usé leurs forces pour aboutir à la conception de théories inadmissibles, dont l'application, hereusement impossible, entraînerait un bouleversement général dans les rapports internationaux.¹

The most dangerous enemies of international law, at the present tragic moment, are the dupes of John Austin, who deemed it nothing but morality, devoid of effective sanctions, a kind of *comitas gentium*, entitled to but the slightest respect as pure law. Their insistence on a lawgiver, supported by force, has completely obscured its true nature and vitality. They have exercised a disastrous influence on its interpretation and defense. Instead of enriching its content, they have greatly attenuated its scope and force. They have been a most demoralizing faction within the citadel.

No one has demonstrated more vigorously and convincingly the fallacy and the falsity of the Austinian theory of jurisprudence than Thomas A. Walker in his *Science of International Law*:

Law is an affair of Human Conduct, and Human Conduct is an affair of Cause. Day by day with the progress of time, the Cause advances to greater prominence; but a definition historically perfect must take as its main foundations the article of conduct, must look to Order, and not to Force, to Obligation, not to Sanction. . . . (p. 41.)

Municipal Laws are rules of conduct observed by men, or by men recognized as binding, towards each other as members of the same State.

International Laws are rules of conduct observed by men towards each other as members of different States, though members of the same International Circle. (p. 44.)

The term law, then, translates into English a long succession of other terms, which have been employed by various peoples from time to time to express their conception of a particular notion. The analogies set forth have been divers, but the consistent notion to be extracted from all is not command but obligation, not imposition but observance, conduct and orderly conduct. (p. 24.)

A delimitation of "law," which differentiates by reference to the common superior and the sanction, may well suffice for a purely formal science of jurisprudence, a science of dead logic. But a science of law which shall reform and improve must be applied, must be a living science of conduct. Precision of language with the jurist is not an end in itself, but a means. The end of law is not the construction of a formally faultless Code, but Order and Education, the guarding and guiding of the destinies of Men. It were a poor ethical teaching for any society to refer right and wrong to the bare terms of Command. (p. 35.)

Austin's definition, however apt it be to the circumstances of modern

¹ *Traité de Droit International Public*, Tome 1^{er}, Première Partie, p. 64.

state life, has no universal application. For albeit in the present days laws may be, and laws commonly are, the declaration of the will of determinate authors, determinate lawgivers, such lawgivers commonly passing under the style of sovereigns, it has been, and is, by no means possible at all times to point out any such determinate lawgiver. (p. 11.)

The rules of conduct operating amongst primitive peoples are not commands issued, or set, by a Sovereign One or Body, and sanctioned by a definite penalty to proceed from the One or Body, and to be incurred by the offender. Primitive Law is Custom, Custom observed on account of its antiquity or on account of its supposed Divine origin. Custom is a Law in itself: its own legislator and its own sanction. (p. 12.)

A law observed must be in *some* way enforced, and, if observance cease in any community, that community is doubtless *so far* "lawless." But the truth is that the opinion of an indeterminate body is often a sanction far more effective than are the penalties annexed by the determinate legislator. In the most strongly centralized community the success or the failure of a legislative measure will depend on the fact that it is, or is not, a reflection of current popular opinion. The free use of criticism will secure the speedy repeal of a hateful edict, unless indeed that edict be supported by the free use of the axe or the scimitar, the knout or the bayonet, and even so, in the fullness of time, it may behove the tyrant to reckon with the agents of his tyranny, praetorians or Mamelukes, Janissaries or Strelitzes. (p. 15.)

Yet the first historic Law is Custom. Early Law is not command enunciated by a determinate Sovereign legislator, and guarded by regular penalties of fine or corporal punishment, but Custom administered by some headman, priest, patriarch, princeps or popular magistrate, and sanctioned by social ostracism, descended, perhaps, from a still earlier devotion to the Infernal Gods, and descending into practical downright outlawry. . . . Custom precedes "Proper Law" in the beginning of States, and not infrequently extends its sway far among the facts of modern political organization. (p. 20.)

Sir Henry Maine adds the weight of his great erudition to help demolish the narrow, false, and dangerous Austinian concept of international jurisprudence:

Here one cannot but remark that a serious mistake as to human nature is becoming common in our day. Austin resolved law into the command of a sovereign addressed to a subject, and always enforced by a sanction or penalty which created an imperative duty. And the most important ingredient brought out by this analysis is the sanction. Austin has shown, though not without some straining of language, that the sanction is found everywhere in positive law, civil and criminal. This is, in fact, the great feat which he performed, but some of his disciples seem to me to draw the inference from his language that men always obey rules from fear of punishment. As a matter of fact this is quite untrue, for the largest number of rules which men obey are obeyed unconsciously from a mere habit of mind. Men do sometimes obey rules for fear of the punishment which will be inflicted if they are violated, but, compared with the mass of men in each community, this class

is but small—probably, it is substantially confined to what are called the criminal classes—and for one man who refrains from stealing or murdering because he fears the penalty there must be hundreds or thousands who refrain without a thought on the subject. . . .

What we have to notice is, that the founders of International Law, though they did not create a sanction, created a law-abiding sentiment.²

It is distressing to note how many commentators on the law of nations have been confused and crippled in their reasoning by the Austinian dogma. This has been particularly evident in recent years, since the first World War awakened a fresh interest in the subject. Under the influence of Austin, many students have been led to condemn the law of nations as something negligible, a kind of orphan child of jurisprudence. They have been more concerned with the police power than with the consensus and will of the community. The legislature has been regarded as of greater value than popular customs and sentiments. Statute law is held to be more desirable than common customary law. The demand for treaty-made law has become more insistent. Interest in the historical evolution of usage into custom, and custom into law, has been greatly lessened.

This attitude found open and definite expression in the belief that the League of Nations could impose law by legislation, and the Permanent Court of International Justice confirm this legislation. The technical experts of the League were expected to prepare the way for an international statute law or treaty-made law. A code was to be built up composed of these enactments and treaty provisions.

The teaching of international law has suffered seriously in recent times under the influence of the Austinian concept. Instead of stressing its logical, historical evolution, the emphasis too often has been on case law. Continuity and perspective in the growth of this science was neglected. It tended to become a kind of mosaic, without the cement of valid principles, and composed of various court decisions of divers hues and values. The term science would seem to have only the slightest significance in the teaching of case law. The student emerges with little more than an encyclopedic knowledge of cases and precedents. He has gained no real knowledge of the true nature of the law of nations.

The demand of the disciples of Austin for treaty-made law has been especially unwise and regrettable. They ignore the fundamental fact of the evolution of the common law of nations from usage and custom. They fail to realize that, with very rare exceptions, such as the Treaty of Paris, treaties do not create international law, but confirm and register established usage. Treaty-made law necessarily represents diplomatic compromise and frequently reveals gross inconsistencies with accepted usage. The very worst forms of treaty-made law are those conventions aiming at the

² International Law, p. 50.

codification of international law. It has had a most demoralizing effect on the clear understanding of international common law.

The influence of the political theorists, of the glossateurs, of the sentimental reformers, and of the followers of Austin, many of whom are devoid of historical, philosophic, or analytical aptitudes, has been highly deleterious. The general result is a growing confusion of voices among the defenders of the fortress. They are unable either to unite in its adequate defense or in its reinforcement. The situation is alarming.

International law obviously is in great need of rehabilitation and renovation to meet the exigencies of this crisis in civilization. An entirely fresh approach to the subject is required. Grotius had the courage and the objective scholarship, at a time very much like the present, to defend and formulate the existing law of nations. It is true that he was a crusader, intent on the amelioration of the horrors of war, and compelled to make a moral and spiritual appeal in the support of his erudite thesis; but he was no sentimentalist. He did what the defenders of international law are called on to do today, namely, to study the history of human society in all its ramifications in order to discover the principles of law inherent in the international intercourse of peoples and nations. His achievement consisted mainly in making the nations realize that a law was being gradually evolved that deserved their respect and support.

In rightly understanding Grotius it is essential to note that his appeal to natural law was entirely subordinate to his appeal to precedent and established usage. With prodigious scholarship he ransacked recorded history for evidence of the usages and customs accepted in the ordinary intercourse of peoples and nations. He concentrated on human interests and conduct, and on the principles applicable to the forwarding and protection of these interests. The bedrock basis of his system was the simple fact of the ineluctable necessity of international contacts and intercourse.

Grotius recognized that the first interest of peoples and nations was the protection of their agents. The "heralds" charged with negotiations for peace were entitled, by the very necessities of the situation, to complete respect and immunity from restraint and molestation. The *lex legationis* thus evolved naturally and logically *ex necessitate juris*. The sailors engaged in trade, or shipwrecked on foreign shores, were accorded special consideration because of reciprocal advantages. The Laws of Wisby, Rhodes, Amalfi, and Oléron came into existence out of the need for trade and intercourse. Merchants in transit, or domiciled in foreign ports, were granted many privileges and rights. To such an extent, that entire communities of foreigners were allowed to reside in their own separate municipalities and to be judged by their own customs and laws. These early privileges in Egypt, Turkey, Scandinavia, England and elsewhere were far more liberal than much later practice. In those times the personal status of

foreigners regarding marriage, guardianship, inheritance, contracts, etc., was held in the greatest respect. And out of these usages was gradually evolved the *jus gentium* and that branch of law known as private international law.

The discovery and occupation of deserted islands and thinly populated lands gave rise early to certain usages which Grotius interpreted by the Roman law of *occupatio*. Then followed logically the development of usages and principles of law regulating the recognition of new international entities and governments.

Grotius thus found a large body of precedents and rules of conduct to enable him to write his magistral treatise on the laws of peace and war. Since his day the law of nations has been constantly and steadily evolving in a most impressive manner. Slavery and piracy both became subject to international proscription. The freedom of the seas compelled the adoption of fixed rules and obligations. The adequate protection of the shores and waters adjoining independent nations compelled the acceptance of international regulations which are still in the process of evolution. So also with the law of neutrality, which was logically inherent in the right of nations to independence and freedom. Even under rapidly changing modern conditions, its principles are sound, though in need of drastic revision. The laws of war likewise became more humane and respected among nations, until the appearance of Hitler and his criminal associates intent on reverting to primitive conditions of savage warfare.

639 This process of the gradual evolution of international law is a momentous fact which should not be ignored because of the ravages of international gangsters. It is a process inherent in the mutual necessities of nations. Its greatest sanction lies in "the desire for reciprocal advantage and the fear of retaliation." The development of international law cannot be arrested. The need for a fresh clarification and general renovation, however, should be recognized. There must be a fresh approach to the subject with the willingness to develop new methods as well as to make use of old materials and procedures. There is immense need of what Roscoe Pound has well termed the "engineering attitude" of approach to new problems.) For example, the problem of governments in industry and commerce presents difficult and novel factors in international jurisprudence. The amazingly rapid development in aeronautics has completely revolutionized many phases of international intercourse, and thus requires special legal treatment. The social revolution now sweeping the world and bringing with it problems of unemployment, hunger, disease, crime, mass migrations, and the like, will demand the best intelligence of international experts.

No field of scholarly scientific investigation can offer such allurements and rewards as the vast field of international law. But it needs consecrated devotees who are willing to emulate Grotius and to avoid the ruts deeply

worn by his successors. They must emulate his amazing historical knowledge, his powers of analysis, and above all his moral and spiritual appreciation of the motives that determine human conduct, human order, and law.

PHILIP MARSHALL BROWN

RE-EXAMINATION OF INTERNATIONAL LAW

A re-examination of the rôle of law in international affairs is extremely urgent if the full possibilities of international law are to be realized in the post-war world. No informed person believes that international law has collapsed and disappeared from the calculations of Foreign Offices. No government which is engaged in planning for the post-war world on the basis of a victory by the United Nations envisages a world in which international law will not play a tremendously enhanced rôle. The likelihood that the scope of international law will be extended to include the regulation of many difficult political and economic questions (hitherto regarded as outside the scope of international law because they were "political" questions) renders imperative an examination of the theoretical foundations of international law in order to discover the capacity of that legal system to perform new tasks.

Undoubtedly the most disillusioned among the confraternity of international lawyers are those who expected from international law more than it was capable of achieving in the nature of things. When the Geneva system collapsed it was felt by some that the whole *corpus* of international law, slowly evolved through several centuries, had disappeared with the League. Only a trifle less pessimistic were those who regarded all principles of international law, except those designed to stop "aggressors," as *trivia*. It seems appropriate to recall the sage observation of Professor Edwin Borchard that "international law constitutes but one aspect of international relations, in many respects not the most vital." This is a recognition of the fact that the economic and political factors most likely to lead to war have hitherto been unregulated by restrictive rules of international law, but it is a long way, indeed, from accepting the charge that, therefore, the great *corpus* of international law consists of nothing but *trivia*.

Professor Borchard's observation also serves to remind us that what is popularly regarded as the breakdown of international law is a consequence, not the cause, of the present crisis. A system of law is not identical with a system of government, nor an adequate substitute therefor. The tendency to regard international law as a governmental system or to blame international law for its narrow scope is wide of the mark. It overlooks the fact that law is not a self-generating mechanism; law is the creature of men, and the men who direct state affairs have failed to provide and operate adequate international institutions for the performance of governmental functions in the international sphere.

A re-examination of the nature and function of international law thus involves more than a restatement of existing rules or a reaffirmation of its legally binding nature. It inevitably involves study of the institutional framework required for the more efficient enactment of international legislation, and for the administration, execution or enforcement of law as a means to assist in fulfilling functions of public welfare and public order in the international community.

While a number of groups, official and unofficial, are engaged in making studies and drafting blueprints for the political and economic international organization of the post-war world, there remains a specific task for which international lawyers are peculiarly adapted and which, in all likelihood, will not be undertaken unless American international lawyers undertake it. This task is a searching reassessment of the values and the function of international law as a juridical system for the future. International lawyers in most countries of the world are, unhappily, in no position to perform this task. The United States Department of State, particularly with increased burdens because of the war, is probably in no position to undertake a theoretical study of the nature and function of law in the international community. Persons untrained in the discipline of international law can bring but a limited comprehension of its flaws and needs to the solution of its problems. There remain, however, numerous members of the American Society of International Law, who, by individual or group contributions, have the opportunity of influencing the development of a vital law of nations more consonant with contemporary needs.

The approach and the methods to be employed in making this reappraisal and renovation require serious thought. For example, the writer believes that a ringing manifesto, a clarion call by American international lawyers reaffirming the principles of the sanctity of treaties, the advocacy of international self-restraint, the adjustment of international disputes by peaceful means, the promotion of security and stability by orderly processes carried out in a spirit of mutual helpfulness and accommodation, would be considerably less than useless. Sixty states agreed with these propositions in 1937.¹ There is a surfeit of statements and manifestoes telling states what they

¹ Cf. Fundamental Principles of International Policy, U. S. Department of State, Publication No. 1079. Only the Portuguese reply to Secretary of State Cordell Hull's statement of July 16, 1937, attempted to do more than agree with the lofty sentiments therein expressed. The Portuguese Government, after stating that everyone could agree with those sentiments, added in part: "Difficulties begin only when it is sought to pass from the field of intentions into that of action. . . . International society has endeavored to solve its difficulties . . . by means of abstract formulae, declarations of principles, solemn assertions, many texts and treaties. . . . Although much responsibility seems to lie with the abstract and generalizing tendency of jurists, the causes for the failure must be found . . . (a) in the in-existent or insufficient study of the causes of world unrest; (b) in the excessive ambition to find a sole formula for the solution of grave international problems, applicable *urbi et orbi*. . . ." *Ibid.*, p. 48.

ought to do (as if the appeal to morality had the slightest effect on the rulers of some hundreds of millions of the world's people!). There is altogether too little scientific study of what states actually do, why they do it, and what they might conceivably do instead. Eventually, those of us who believe that a better world is possible hope that the emphasis on state interests will be replaced with an emphasis on the interests of the international community. That is precisely our problem. It is less important today to reaffirm that the states of the world form an international community with increasing common interests than it is to discover why, despite these common interests, international law has proved inadequate where it is inadequate. It is less important to proclaim once again that *pacta sunt servanda* than to discover what law *can* do and what it probably cannot do. It seems of vital importance to study the relationship of international law to international politics. It seems essential to enquire whether a conception of international law as a series of prohibitions set against the power politics of states has as much chance of succeeding as a conception which regards international law as the functional exemplification of the rules of order necessary for the attainment of a specific end—for example, the efficient operation of an international postal system. Can the problem of war be better handled by passing a law against it (*vide* the Kellogg Pact) or by establishing the jurisdiction of the international community to deal with threats to peace (*vide* Art. XI of the Covenant)?

Professor Percy E. Corbett, in his admirable little book, *Post-War Worlds*, indicates some of the fundamental paradoxes of traditional juristic thinking which need re-examination. He writes:

It has been a long and costly deception to assert the existence of international law and at the same time to deny that the state is bound by any rule to which it has not given its explicit or implied consent; to declare that states owe obedience to international law but to maintain that they are themselves judges of what the law is and what constitutes obedience to it, and may always legally refuse to submit such questions to impartial decision; to talk of a law binding upon nations but to insist that where it appears to conflict with the law of the state the courts and officials of the state must apply the latter; and finally to pay lip service to an international legal system while admitting that any violation of another's acknowledged right may be legalized by a declaration of war.²

Since no adequate reappraisal of the rôle of international law can be made merely in terms of itself, it may be wise to recall the advice of Professor Manley O. Hudson that

the future law of nations must seek contributions from history, from political science, from economics, from sociology and from social psychology if it would keep pace with the society which it serves; and a sound philosophical basis for the international law of the twentieth

² Farrar and Rinehart, 1942, pp. 103-104.

century can only result from "a functional critique of international law in terms of social ends."³

HERBERT W. BRIGGS

FORCES WHICH WILL SHAPE THE REBUILDING OF INTERNATIONAL LAW

There has never been an opportunity better than that which now lies before us for building up international law. The series of shocks which the present crisis has brought upon the individual who has in the past been inclined to witticism, if not to contempt, as to the law of nations, has made him realize the importance of that law to himself. He now asks that a strong system of law and order be built; he calls upon the international lawyer for leadership in this task. To this plea the international lawyer should respond with eagerness, and with a sense of the seriousness of the task and of the greatness of the opportunity. He will find—he now knows—that the unfortunate situation of the law of nations is due to certain great changes in habits of life which have been developing over a century or more of time. Those forces have made themselves felt within each nation and have produced in each a great increase of law and government. They have been felt more slowly in the wide interrelationships of nations, but they have cumulated in the present crisis, and they will undoubtedly produce within the community of nations, as within each nation, an increase of law and government for the community of nations. These forces, therefore, must be carefully considered by those who seek to rebuild law and order in the community of nations.

First of these, and productive of the others, is the interdependence which has been developing since the Industrial Revolution. It is not necessary to explain this development to readers of this JOURNAL. It has wrecked the independence of the individual, and has made him dependent upon thousands of persons, in far corners of the world, of whose very existence he may be unaware. He can no longer be self-sufficing; he must have his needs brought to him over thousands of miles of complicated means of transportation. The efficiency and reliability of those persons who produce, who buy and sell, who transport and deliver now means prosperity or even life to him. He has been caught up into a system, of which he is but a tiny part; and it is desperately important to him that this system operate efficiently, and with fairness to himself. The only way in which he can do this is through government, and upon government he calls more and more.

His dependence is not confined to those who are within the confines of his own nation. His prosperity, his very livelihood, depends directly or indirectly upon persons and agencies beyond his own frontiers and beyond the control of his own government. He can not solve this problem by asking for more national law and administration. The system into which he has

³ "The Prospect for International Law in the Twentieth Century," 10 Cornell Law Quarterly (1925), pp. 434-435.

been caught up, intricate and world-wide, reaches far beyond his national government. The state which he has organized and maintained for the protection and advancement of his own welfare, and which he has for so long regarded as the ultimate in human organization and as his sufficient protection, is no longer able in an interdependent world to serve these purposes. He must now, for his own self-protection, for his very existence, look beyond his own state, but he must still look to government. His state, hitherto *ne plus ultra*, must now become part of a wider system of government for the community of nations. There is no other solution available in human experience—except the system in which might makes right.

Obviously, the above change has significant consequences for international law. Since the state is no longer competent, can no longer perform its function properly, it can not set itself above the law of nations; on the contrary, it must rely upon that law. The theory that a state can not be bound save by its own consent—if such a theory ever had validity—can not be maintained in a situation in which a state has become actually dependent upon others. The factual situation is that the doctrine of sovereignty can no longer dominate, and that each state will have to give up some of its sovereign rights in order to get the protection and assistance which it must have. It is clear, too, that the complexities and dependences of today necessitate international organization and administrative agencies; and this implies the issuance of law by a common authority, and its application by a community judge.

Development in this direction has been going on, of course, for many years, grudgingly and insufficiently. International public unions and administrative agencies of various kinds have been created; tribunals of justice have been established; a more comprehensive system has recently appeared in the League of Nations. But all of this growth has been checked—has indeed been wrecked—by another change, another pressure which must be taken into serious consideration in the rebuilding of law and order. This is modern war, itself changed by the industrialization and interdependence which have wrought so much change in our life. Again, it is unnecessary to describe for the readers of this JOURNAL the character of modern war;¹ but its effects must be noted.

When war starts today, no people can hope to escape it. So long as a struggle between two states did not affect others, the others might find some justification for regarding it as of no concern to them. But, granted the interdependence mentioned above, this can never again be true. The interest and right developed in the Convention for the Pacific Settlement of International Disputes (1899) and in Article 11 of the Covenant of the League of Nations must now be carried forward into obligation. Aside from moral principle or civic obligation, each state must as a matter of sheer self-preservation attempt to prevent war anywhere. And if it is true that interdependence

¹ See this JOURNAL, Vol. 35 (1941), p. 659.

allows no state to escape war, it is likewise true that no state can fight a war alone. The state which makes war must depend upon materials outside its own boundaries, and may feel it necessary to take them by force, in order to be sufficiently prepared to make war. Such a state will of course divert its own resources, human or material, from ordinary purposes to war purposes; it will tax its citizens heavily, for modern war is costly beyond calculation; it will conscript and train its citizens for war-making. It must do these things, if it is to survive in the arena of modern war; and thus the very maintenance of the state which is supposed to aid its citizens now makes for their suffering and discontent. This, it is to be noted, is not a temporary thing; so long as a state may be threatened by war, so long must that state be prepared against the coming of war. It is thus forced to move in a direction opposed to that of law and community order. If each state is to rely upon itself, it is forced toward autarchy, and it must build up its self-sufficiency by whatever means are possible. It must organize its internal resources, material or human, into the totalitarian régime through which only modern war can be fought. Modern war is a centrifugal force, in the sense that each nation, in order to be prepared against it, must disregard the rights of others, and build up its own strength at whatever cost to other states or to its own citizens. The state, created to serve the individual, must sacrifice him in order to exist.

It is obvious that international law can not stand against this sort of war. Of course, law and war have always been contradictory—a senseless antithesis within a legal system; but in the past, the strength of customary law has enabled it to exercise some degree of control over war itself, and to carry on outside of the areas involved in war. This is no longer true. The only way in which international law can hope to survive is to bring war under control, and the implications and difficulties involved in this task are enormous. It is not possible to deny to a state the right to use the force which is its only protection against injustice unless provision is also made to assure justice to it. Nor is it possible to prevent war by mere fiat, by the legal phraseology of a treaty. Words alone can not do it; the law must have behind it a physical strength sufficient to stop the war-maker. The effect of this second great pressure—modern war—is to make impossible the necessary development of international law unless that law declares war illegal and is able to enforce its rule. (This means nothing less than a powerful international government, able to overcome the war-maker and to do justice in the face of resistance. The international lawyer must think not merely in terms of law but in terms of government.)

The result of these pressures has been to leave the individual with an anxious feeling of insecurity; and this also has its effects for international law. The desire of the individual for security has become a driving force which must be taken into the calculations for the future. For long he has relied upon his state to give him this security; now he is driven to look beyond the

state.) Since the state is unable to give him the security which he covets, he must look beyond domestic government to international government, beyond domestic law to international law. That he is doing this is proven beyond doubt by the various barometers of public opinion. On the one hand, then, international law gains in the expectation of greater support from people everywhere, in the development of a loyalty on the part of individuals which reaches beyond the state to the law of the community of nations; on the other hand, international law must consciously take into account the needs of the individual, and must aid his own state to take care of him as he wishes it to do. Hitherto international law has been a law for sovereign states only, and it has given little recognition to the individual who is, after all, the unity of human society. It must now recognize that its function is, directly or indirectly, to aid the individual. Whether this means the recognition of the individual as a subject of international law, or whether procedural adjustments are all that is necessary, will be a matter of debate. Whether an international bill of rights is desirable has now become a serious enough matter to be taken up for study by the American Institute of Law. In any case, the international lawyer must recognize his duty to individuals, and should take advantage of the current realization by individuals that this law is of importance to them.)

Many other implications for international law beyond those above suggested can be drawn from the present crisis, but these deserve exhaustive study by the profession. The conclusions are irresistible that, in order to meet the situation of interdependence, there must be international organization and administration, as well as more law; that, in order to meet the overwhelming threat of modern war, this organization must have sufficient authority and physical force to control war-makers and to impose the justice of the community above the selfishness of the nation; and that, in order to meet the needs of human beings—for whom all political organization exists—the law of nations must aid states in the task which they are no longer able, by themselves, to accomplish, that is, to advance the welfare of human beings. And it is submitted, finally, that the present situation presents an unparalleled opportunity for international lawyers, who should proceed to the rebuilding of the law of nations with courage and foresight, and with proper adaptation to the tremendous forces and pressures at work in the world today.

CLYDE EAGLETON

MILITARY REPRISALS AND THE SANCTIONS OF THE LAWS OF WAR

The validity of any system of law must depend in first instance upon its general or substantial acceptance by those whom it is supposed to govern. There must be such acceptance and recognition of its validity by a considerable proportion of them. But where there are in addition not a few who would willingly disregard the law, the effective application of a sanction or

penalty for its enforcement becomes essential to the survival of the rule of law. True it is that no perfect system of sanctions or penalties can be found. But every law must have a sanction sufficient to exert a deterring influence on those who would otherwise be inclined to disregard it.

According to a London press dispatch¹ as reported by The Netherlands Government-in-exile, the Nazis shot five distinguished Dutchmen in reprisal for the wrecking of a German troop train August 7. The victims were held as hostages under the threat of execution unless the saboteurs should be delivered before August 15. General Friedrich Christeiansen of the occupation forces is reported as saying "The perpetrators of the high explosive attempt in Rotterdam have been too cowardly to give themselves up." This tragic incident raises the question as to the nature of and justification of acts of reprisal and the punishment of violations of the laws of war.

In our present system of world law, it is to the governments of each of the politically independent states that is entrusted the task of enforcing respect for whatever rule of international law may have been violated within its jurisdiction or elsewhere in denial of its sovereign responsibility or against its national interests. When a state is the transgressor, the sanction applied by the injured state is, in the last analysis, war; and the fear of war has been appropriately regarded as a sanction to curb the transgressions of the less law-abiding states. With the outbreak of war, however, the restraining fear of war must disappear. Consequently, as long as the conflict lasts, whatever rules are recognized as governing the conduct of war are in a peculiar, not to say precarious, position.

If we may regard public opinion in neutral states as some slight check upon the unbridled action of either contestant, even that restraint disappears when, as at present, the whole world is engulfed in the struggle. Then military advantage and effective fighting become the sole criteria. Even so, in this almost free field for the play of brute force, we may still recognize a certain number of rules which command some respect. It is important to examine what are these rules which warring states observe in the absence of any supranational enforcing agency or sanction.

RULES OF WARFARE WHICH MAKE FOR MILITARY EFFICIENCY

Such a rule is that which prohibits pillage. Pillage by soldiers tends to disrupt military discipline, to burden the transportation facilities of the army with booty, to cause the irritation of soldiers less fortunate in plundering, and to arouse the molested inhabitants to acts of hostility. Obviously, when military discipline became adequate to the task of enforcing the order, commanders like Wellington in Spain prohibited their troops from engaging in pillage.

Again, in occupied territory pillage will prevent the forces from obtaining needed supplies which the inhabitants secrete, will make the inhabitants less

¹ Associated Press despatch, Aug. 15, 1942.

docile in the case of ultimate annexation, and will leave a territory less able to contribute financially to meet the needs and exactions of the annexing conqueror. This explains the alleged objection of the German General Staff to Hitler's harsh measures in occupied France. Rules of this class do not ordinarily need any sanction since they have the support of self-interest when rightly understood. They may be expected to restrain even those who are but little influenced by considerations of humanity.

UNNECESSARY CRUELTY

In last analysis, any action or expenditure of effort which does not have a military object or does not aid in securing victory is a waste, and in the interest of efficiency should be avoided. By definition, unnecessary cruelty comes under this heading. The torture of prisoners, customary amongst savage tribes, sometimes occurs in the case of supposedly more civilized peoples. It is, however, more an irrational outlet or reaction from fear and irritation than an aid to military success. The fear of torture is, on the contrary, a strong motive for the most stubborn resistance. When invading troops, in retaliation for guerrilla operations, commit all kinds of atrocities, it only leads to more desperate resistance. This has been demonstrated in the present war in Russia and China. For the purpose of doing away with unnecessary cruelty, the Declaration of St. Petersburg prohibited the employment of any projectile of less than 400 grammes which is either explosive or charged with fulminating or inflammable substances. It is still more cruel to employ heavier projectiles of this nature, but the states most likely to benefit from employing them can hardly be expected to agree to a prohibition upon their use and to forego their military advantage.

RULES OF WARFARE RECOGNIZED AS MUTUALLY BENEFICIAL TO BOTH CONTESTANTS

When the contestants are about evenly matched as to the supply of fighting forces, the equivalent exchange of prisoners is of equal benefit and does away with heartrending suffering. But when such equality does not exist, exchange is a disadvantage to the side that has the largest forces to draw upon, and it will be loath to agree. In our own Civil War the North was slow to exchange the Union soldiers held in Libby Prison. No wonder that the captives are not too well healed under these circumstances.

There is, however, one rule of warfare the respect for which is always in the interest of both parties to a conflict; namely, the observance of good faith: the respect for military honor. A surrender, when the only alternative is suicidal slaughter, is in the interest of both parties, but this could hardly be brought about unless those surrendering had confidence that their lives would be spared. In cases where surrender applies to larger units, it could hardly be arranged unless the preliminaries were protected by the respect for the white flag accompanying the negotiations.

Perhaps the most important restriction recognized to be of common benefit is that of the Red Cross Convention. There are, alas, many, many claims of violation, but by and large the personnel and insignia of the Red Cross receive the respect and immunity which is their due. Even in our own Civil War before the Geneva Convention was signed, medical attendants upon the basis of reciprocity were given immunity from capture.²

RULES IMPOSED IN THE INTEREST OF SCIENTIFIC WARFARE

There is another important and special application of the restriction in the common interest of the warring states which tends to facilitate and preserve the scientific conduct of war. For instance, the prohibition upon the assassination of an opposing general. Certainly such an act is not more cruel than many another method of modern warfare, but it would play into the hands of those states less able to develop capable leadership. It has naturally against it the weight of great military states and of the professional officer class who influence the moulding and observance of the rules governing the conduct of war. There may be here likewise something of the sentimental abhorrence of treachery which is a sentiment general to mankind. If, however, assassination were recognized as justifiable, it would really be no more treacherous than the use of booby traps or the hidden mines which retreating troops strew in the path of their advancing enemy.

When an adventurer offered to assassinate Napoleon, Fox had him arrested and warned the French commander. We find other manifestations of this principle of scientific warfare in the condemnation of the shooting of pickets except when a surprise attack is contemplated. It may well be that the advent of total war and increased government control of all civilian activity may lead to the disregard of the prohibition against assassination, as that against the sniping of pickets has been rendered obsolete or less important by airplane scouting. If so, it would not now interfere to the same degree as formerly with scientific warfare because each command could provide carefully and effectively for its protection. It would appear from certain reports that opposing forces do even now refrain from bombing staff headquarters. If this be true, it serves as another application of this same principle. It would seem that there is a gradual trend of the world towards the scientific coördination of all human effort both military and civilian in the struggle for victory.

GUERRILLA WARFARE AND OCCUPIED TERRITORY

The prohibition against guerrilla warfare, known as the activity of irregular troops or *francs-tireurs*, is often declared to be a violation of the laws of war. It is true that those who engage in such warfare pay with the penalty of their lives when captured. When a territory is invaded and fully oc-

² Official Records of the Union and Confederate Armies, Series 1, Vol. XXXV, Pt. II (Serial No. 66), pp. 170, 175, 176, 200, 210.

cupied, the inhabitants cannot expect to be treated as peaceful non-combatants if they engage in acts of sabotage or war. They cannot have their cake and eat it. But when inhabitants of the invaded territory are able to carry on really effective guerrilla warfare, it is perfectly justifiable for them to do so. Only, the invaders cannot be blamed for executing those they capture in the commission of these acts. They may furthermore be expected to employ appropriate measures to put pressure on the peaceful inhabitants to prevent them from participating in these hostilities or to induce them to make efforts to prevent them. But the test of what is appropriate is to be determined by what is really effective.

Now that totalitarian war has brought the whole nation, men, women, and even children, into the war effort, so that they all participate in the industrial and agricultural effort for victory, military assault to break down civilian morale, and even the taking of civilian life, may exercise an important bearing upon the ultimate triumph. If the effect of such pressure and attack upon civilians were well balanced upon both sides, it might well be omitted in deference to humane considerations and a common interest in the survival of those beloved by the militant forces. But this equipoise does not exist, and in modern war civilians are subjected not only to bombings but also to starvation blockades. As long as bombings can be used to destroy the industries feeding the military machine and the instruments of transportation, civilians suffer only indirectly and by hazard. But when the object is to break the will to fight, pressure bombings of civilians, as in the German assaults on Rotterdam and London, are likely to be employed. The same may be true in regard to the use of gas against civilian centers as soon as it is certain that it will serve a military purpose. It would appear, however, that the use of poison gas for this purpose is very difficult to carry out in any effective manner.

Guerrilla warfare and sabotage on the part of the civilian population is more logical and more effective now that the whole populations have been so completely embraced in the war effort and industrial production has come to play so great a rôle in the success of military operations. Although guerrilla warfare and sabotage have become more effective in total war, it has also become more important for the invading and occupying forces to prevent the commission of these acts. The acts themselves are not contrary to the laws of war any more than is the act of the patriot who risks his life in spying. But the occupying forces may be expected to apply so far as possible whatever effective means of prevention or repression they may have at their disposal.

PROTECTION OF SCIENCE AND ART

In wars between two or between a few states the common interest of humanity in the protection of science leads to the inviolability of those engaged in scientific expeditions. Similarly, works of art are spared so far as mili-

tary exigencies will allow. But in a war such as the present, these immunities are greatly restricted. It would seem that the Germans purposely bombarded Canterbury Cathedral, allegedly by way of reprisal, but the British bombings were confined to military objects. Care was taken not to bomb Cologne Cathedral when the important rail center in that city was devastated by the R.A.F. In the press the British were stated to have threatened to bomb Rome if Athens or Cairo were bombed. This threat of reprisal has, however, lost most of its significance since the Axis invasion of Greece and the increasing apathy of the Italians for their inglorious rôle as they are dragged willy nilly along by the Nazi war machine. But the fact that the threat was considered necessary showed that this ruthless world war of rival ideologies has lowered the respect for science and art almost to the point that it rests only upon the fear of reprisal. In the first World War, the Carnegie magnetic expedition was respected by the Central Powers. No doubt some instances of a similar immunity will be found in the course of this war.

RESTRAINING INFLUENCE OF POPULAR SENTIMENTS AND TRADITIONS

The previous discussion has indicated that the rules of warfare are confined to those restrictions which are either of mutual advantage or which make for effective fighting. There are, however, certain restrictions which do not seem to conform to this description. There exist throughout mankind sentiments as to a fair fight and chivalry which are so deep in the human heart that they rule out certain acts, which might give a military advantage. If commanders were to order or permit the commission of acts which shocked the sentiments of the more-civilized portion of their troops or of the civilians behind the lines, it would cause a weakening of the support of the military effort and hence would not really be effective warfare. There is something of this irrational and sentimental feeling towards the use of any new weapon or method, such, for example, as poison gas. The United Nations are more subject to the influence of humane considerations and to such popular and sentimental restraint. It is possible that they may well prefer to lose some military advantage rather than to pour gas upon the cities of Germany, but if the German command refrains, it is no doubt either because German cities are more vulnerable or because the advantage would be evenly balanced by the loss. In this latter case, the restraint would be due to the principle of mutual advantage. The French formerly were slow to adopt modern firearms because they regarded them as unchivalrous, and this sentimental feeling came near to being the cause of their national undoing. This example should warn us not to fall into the same mistake regarding the use of poison gas or any means which will give us an advantage over our foe. The objection to its use is due to ignorance of the real nature of warfare and may cost us dear if we do not learn better.

It is said that the British and Germans have an understanding not to em-

ploy women pilots. If so, it gives the Germans an advantage because their ideas of the virility of the fighters make them loath to employ women in actual warfare. We have an opportunity to follow the example of the Russians and make the Germans pay the consequences of their ideology which would restrict the field of women. They have swallowed their principle of the superiority of the Aryan when they classified the Japanese as yellow Aryans; so perhaps they would find a way to recognize the fighting qualities of women. It might be well if women could be spared such an Amazonian participation, but total war seems certain to extend its realm and to bring them into the very fray. The side that takes the initiative may have a real advantage, but not as long as an irrational, sentimental reaction makes such a course inadvisable, for it would not then be really effective and contribute to victory.

PUNISHMENT AND RETALIATION

While it is true that observance of the laws of war is in general to the advantage of both contestants, combatants are constantly under temptation to disregard a rule in order to gain some immediate military end. If such a breach could go unchallenged, the respect for every rule would be undermined. Of course, the officer or soldier who violates the rule may be punished when captured, but this is not always possible. Little coöperation on this head is usually shown by the culprit's superiors. In the absence of any superior enforcing authority, the laws of war have to rely for their support or sanction upon retaliation—what are known as military reprisals. But resort to this procedure requires the strict observance of certain rules. Major General Halleck, discussing this question, quotes from the Instructions for the Government of the Armies of the United States in the Field:

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; . . . unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.³

The greatest weakness in this system is the fact that those to whom it is applied may have so little sense of measure that they will reply with still other violations and start down the incline that leads to a war of savagery. This only emphasizes the need of an international jurisdiction and collective sanction.⁴

We have indicated above that if the civilian population engages in guerrilla warfare or acts of sabotage, those that are captured cannot expect to be treated as prisoners of war, and will be executed. But when it is not possible

³ This JOURNAL, Vol. VI (1912), p. 108.

⁴ Y. de Brière, "*Evolution de la doctrine et de la pratique en matière de représailles*," Hague Academy, *Recueil des Cours*, Vol. 22 (1928), p. 261.

to seize those who have committed these acts, it is in accordance with military exigencies, and it has been customary, to impose what are known as repressive reprisals on the whole community where the acts have occurred. As in the case of other military reprisals, this punishes the innocent, but war itself is based upon the principle of collective responsibility.

To quote again Major-General Halleck:

... all members of a town or corporation are held responsible in damages for the neglect or carelessness of their agents; so, in war, a city, an army, or an entire community, is sometimes punished for the illegal acts of its rulers or individual members.

But he adds,

Retaliation is limited in extent by the same rule which limits punishment in all civilized governments and among all Christian people—it *must never degenerate into savage or barbarous cruelty.*⁵

This is exactly where the Nazis are most blameworthy. They have imposed penalties out of all proportion and reason. Those in command should remember that, if they are victorious, the fruits of victory will be easier to garner if they have not unnecessarily embittered the vanquished by their methods of warfare and by their treatment of occupied territories. For the moment we are powerless to prevent such atrocious acts as the Nazi mass executions in France, The Netherlands, and wherever they control; but President Roosevelt has issued a warning that those responsible for these crimes will be tried and punished after the Axis has been defeated.⁶

After the last war, in accordance with provisions of the Versailles Treaty, a number of Germans accused of violating the laws of war were tried in Leipzig. In principle this was correct, but in practice it is difficult to administer justice in such cases, and the trials stir up bad blood, and this runs counter to the efforts to reestablish peaceful sentiments between the former enemies. Then, too, the victors generally refrain from trying and punishing those amongst their own forces guilty of violations. The terrible condition of war is made an excuse to try to forget such transgressions. In the present stage of our civilization, this may be about all we can do. But we must try at least to place some restraint upon the outrages that the Nazis are inflicting upon the enslaved lands of Europe. The United Nations are confident that they can make good President Roosevelt's promise to bring to justice those responsible for these cruel, unreasonable, excessive acts of reprisal. Great as must be our sympathy for France, The Netherlands, and other enslaved countries, we have the sad satisfaction of seeing the Nazis digging the grave of their hopes and ambitions as they pile hecatomb upon hecatomb of innocent reprisal victims. For all their science, the Germans are commanded by those who do not understand and they will not be forgiven.

ELLERY C. STOWELL

⁵ This JOURNAL, Vol. VI (1912), p. 110.

⁶ Statement to the Press, Aug. 22, 1942.

THE EFFECT OF A STATE DEPARTMENT DECLARATION OF FOREIGN POLICY UPON PRIVATE LITIGATION—THE NETHERLANDS VESTING ORDERS

Not often does the State Department find itself called upon to take affirmative action to bring the foreign policy of the United States to the notice of a Federal or State court in matters of private litigation. However, the outstanding rôle which economic warfare plays in the present struggle has made it imperative for local courts to be authoritatively instructed where public policy is pertinent to the issues.

The New York Court of Appeals, on July 29, 1942, handed down a unanimous decision¹ of widespread interest and importance in connection with the freezing of assets in this country belonging to domiciled subjects of one of the United Nations, The Netherlands, whose government is functioning in exile. The significance of the decision lies in the fact that the Department of State has formulated a policy with respect to the effect to be given to freezing or vesting orders of an allied government and has brought such policy to the attention of a State court.

The plaintiff's assignor, a non-resident alien, owned certain securities and monies held in The Netherlands by a Netherlands corporation. It was alleged that the corporation, with the assistance of certain individuals, had converted these assets. Action to recover their value was brought against the corporation and the individual defendants, all of whom were domiciled subjects of The Netherlands, and a warrant of attachment was obtained and levied against bank deposits and other obligations and securities belonging to the defendants within the State of New York. Prior to the attachment, a royal decree of The Netherlands Government (May 24, 1940) declared title to all claims capable of being transferred outside the European territory of The Netherlands and belonging to persons or corporations domiciled there, to be vested in the government temporarily resident in London and exercising its functions there. The decree declared such rights to be vested only for the purpose of conserving the property of the former owners, and restitution was to be made three months after the present emergency. The Netherlands Government intervened in the action for the limited purpose of vacating the levy and thus establishing the effect of the decree. The question certified to the Court of Appeals involved the extraterritorial effect of the decree upon intangible property located in this country belonging to the defendants who were domiciled subjects of The Netherlands.

While the appeal was pending, the United States became a participant in the war and a signatory to the Declaration of the United Nations, of which The Netherlands is a constituent member. A letter was sent by the Department of State to the court, afterwards followed up by a suggestion of the Attorney General upon leave granted, to the effect that the United States "has an interest and concern in the subject matter and outcome of this ac-

¹ *Anderson v. N. V. Transandine Handelsmaatschappij et al.* The State of The Netherlands, Intervener. *Law Report News*, July 31, 1942, p. 3; this JOURNAL, *infra*, p. 701.

tion, in so far as there is involved the question of the effect on assets within the United States of the decree of May 24, 1940"; that it is the policy of the United States that effect be given to that decree in so far as it is intended to prevent any person from securing an interest in assets of nationals of The Netherlands located in the United States on account of claims arising outside of the United States in territory now or at any time under the jurisdiction of The Netherlands Government for the benefit of persons not citizens or residents of the United States. The declaration of the State Department filed with the court was limited so as to exclude any question of control which the United States might undertake over any such assets and also excluded any other circumstances not specifically set forth in the declared policy.

The Court of Appeals held that the decree, being the law of a friendly sovereign state of which the defendants are domiciled subjects, had vested their claims against persons or corporations in this country in the State of The Netherlands and therefore the levy was ineffective. Intangible property having a situs in the local state (New York) will be deemed transferred according to the law of the foreign state unless this offends the public policy of the local state. The court adopted the declared policy of the State Department as being in accord with that of New York.

The Netherlands decree was quite unlike the so-called nationalization decrees of the Soviet Union which assumed to confiscate the assets of Russian corporations at home and abroad for the benefit of the state. Thus where the Soviet decrees were set up as a defense to action upon a bank deposit brought by the old officers of a Russian corporation against a New York bank, the Court of Appeals allowed the action and remarked: "the confiscation of its (the corporation's) assets and the repudiations of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity."² It is true that after the Soviet Union had received diplomatic recognition, the same court gave effect to the cancellation of life insurance policies held by subjects of the Soviet Union in domestic companies, but the policies were subject to Russian law by their own terms. Judge (now Chief Judge) Lehman correctly pointed out that the basis of the previous decisions was not the lack of diplomatic recognition but the offense against our public policy,³ and with this view his opinion in the instant case is entirely consistent. The Netherlands decree in effect constitutes the state a trustee for the property of its subjects "which might otherwise be without protection and perhaps subject to seizure by a ruthless enemy for use in prosecuting the war. That enemy is now our enemy. A decree designed for such purposes and having such effect may hardly be said to offend a public policy of the State."⁴

The court quite properly refused to lay down any general principle as to the

² *Vladikavkazsky Ry. v. New York Trust Co.* (1934), 263 N. Y. 371, at p. 378.

³ See *Dougherty v. Equitable Life Assurance Soc.* (1934), 266 N. Y. 71, at p. 106.

effect of the declared public policy of the United States upon the public policy of a State. On the other hand, the opinion of the court extended its dictum quite far afield in intimating that the public policy of a State might have to yield if it would render ineffective a transfer of property resulting from the terms of an agreement with a foreign state. It is regrettable that the court cited (seemingly with approval) the recent decision of the Supreme Court in the case of *United States v. Pink*,⁴ which has been subjected to severe criticism. Here there was no agreement. The issue of that case is not pertinent in the slightest degree in respect to the construction and effect of the Netherlands decree.

To limit the extraterritorial effect of foreign laws when against public policy is described by Story as a matter of self-defense; otherwise the local state might be compelled "to desert its own proper interest and duty to its own subjects in favor of strangers, who were regardless of both."⁵ The extraordinary exigencies of the present war sometimes result in a reversal of the restrictive character of the rule; for here the public policy of the state is precisely to afford complete recognition to the effect of the foreign executive decree with respect to property over which the local state can exercise jurisdiction. Ordinarily public policy acts in derogation of comity in private international law. Neither comity nor public policy establish standards capable of being predicated in advance, and both principles have been criticized as furnishing only shifting bases for solving conflicts of law. Perhaps their value after all lies in their very fluidity because they afford a margin of discretion whereby to meet changing circumstances which time brings forth. As Judge Cardozo has phrased it: "We live in a world of change. If a body of law were in existence adequate for the civilization of today, it could not meet the demands of the civilization of tomorrow."⁶

In a period when totalitarian states seek to exploit for their own purposes the old forms of law established in the interest of impartial justice, the elastic principle of public policy serves as a necessary protection against acts of spoliation performed abroad affecting property in this country.

ARTHUR K. KUHN

NORWEGIAN MARITIME COURTS IN ENGLAND

On May 22, 1941, the British Parliament passed the Allied Powers (Maritime Courts) Act, 1941.¹ Its main purpose was "to make temporary provision for enabling allied and associated Powers to establish and maintain in the United Kingdom Maritime Courts for the trial and punishment of cer-

⁴ (1942) 315 U. S. 203; this JOURNAL, April, 1942, Vol. 36, p. 309. See the dissenting opinion of Chief Justice Stone, *ibid.*, p. 329, and editorial comments by Borchard and Jessup, *ibid.*, pp. 275-288.

⁵ Story, Commentaries on the Conflict of Laws, § 32.

⁶ B. N. Cardozo, *The Paradoxes of Legal Science*, p. 10.

¹ 4 and 5 Geo. 6, Ch. 21.

tain offences committed by persons other than British subjects." In non-technical language, this means that if, for example, a Norwegian seaman violates Norwegian law by committing a breach of discipline on board a Norwegian ship, he can be tried and sentenced by a Norwegian Maritime Court sitting in London. The arrangement is as sensible as it is novel. It solves some of the many legal problems raised by the functioning of "Governments-in-exile" in a foreign land.² By way of illustration, this comment deals with the Norwegian Maritime Courts; it is understood they are generally typical of the like tribunals of Belgium, Greece, The Netherlands, and Poland. Instead of following the sections of the Act, it may be more illuminating to take a hypothetical case and follow it.

S. V., a seaman, while a member of the crew of a Norwegian ship, boarded the ship at Liverpool in a condition of intoxication which prevented him from performing his duties.³ This conduct constituted a violation of Section 426, Nos. 4 and 9, of the Norwegian Criminal Code.

In order to secure the attendance of S. V. before the Norwegian Maritime Court in London, an authorized representative of the Norwegian Government lays before a British Justice of the Peace an information on oath, stating the facts and requesting the issuance of a summons. The Justice of the Peace thereupon issues the summons and if necessary can issue a warrant of arrest to secure the attendance of the defendant. The summons or warrant is served by British officers and it is they who bring S. V. before the Norwegian Maritime Court.⁴

When the seaman appears before the Norwegian Maritime Court he may allege that he is a British national. If he is a British national, the Maritime Court has no jurisdiction to try him. The defendant must be notified of this fact and he must be informed concerning the special British tribunals which have been set up for deciding claims to British nationality. The special tribunal consists of one British lawyer, and if he is satisfied that the claim of the applicant to be a British subject is substantially established, his determination is final and precludes the jurisdiction of the Norwegian Maritime Court. If the claim of British nationality is not established, the Maritime Court may proceed with the trial.

It is still possible for the defendant to challenge the jurisdiction of the

² Cf. Drucker, "The Legislation of the Allied Powers in the United Kingdom," *Czechoslovak Yearbook of International Law* (1942), p. 45.

³ The record of such a case decided by the Norwegian Maritime Court in London, on Jan. 27, 1942, has been made available to the writer by the courtesy of the Royal Norwegian Ministry of Justice. It is a case typical of those brought before these courts. Up to the middle of March, 1942, the Norwegian Maritime Courts dealt with 117 cases involving 181 persons. Of cases brought to trial, 27 resulted in imposition of fines and 52 in prison terms. The longest prison term was 75 days.

⁴ See Statutory Rules and Orders, 1941, No. 872 and No. 873.

court *ratione materiae*. The Maritime Courts have jurisdiction under Clause 2 of the Act over:

- (a) any act or omission committed by any person on board a merchant ship of that Power [*i.e.*, the Power which has established the Maritime Court]:
- (b) any act or omission committed by the master or any member of the crew of a merchant ship of that Power in contravention of the merchant shipping law of that Power:
- (c) any act or omission committed by any person who is both a national of that Power and a seaman of that Power as defined by this Act, in contravention of the mercantile marine conscription law of that Power.

Jurisdiction of the Maritime Court is ousted if the defendant has already been tried for the same offence by any British court, whether he has been acquitted or convicted. The decision of the Maritime Court on the merits is final, but if the defendant challenges the jurisdiction of the Maritime Court he may, under Section 11, apply to the British High Court of Justice to determine whether the Maritime Court does or does not have jurisdiction. Such a proceeding does not suspend execution of the sentence of the Maritime Court. If the High Court determines that the Maritime Court has exceeded the jurisdiction conferred by the Act, all of the proceedings in that trial are null and void. The Maritime Courts are essentially courts of limited jurisdiction. Their authority to apply, on British territory, the criminal law of Norway, derives from the Act of Parliament.

If in the proceedings before the Maritime Court the defendant is guilty of a contempt, he may be punished by the Maritime Court if he is not a British subject, and by the British Court if he is a British subject (Clause 7). Under Clause 6, provision is made for compelling the attendance of witnesses by the use of British official processes.

If S. V. is convicted by the Maritime Court and sentenced to imprisonment, the prison term is served in a British prison. There is a special provision under Clause 8 for the transfer of the person to the territory of a government-in-exile provided such territory is not occupied by the enemy. If the sentence takes the form of a fine, the fine may be summarily recovered by the Norwegian Government in the British courts. A death sentence can not be executed even if fixed by the Maritime Court.

After the Act was passed, it was necessary for the King by Order in Council to designate the Powers to which the Act was to apply. Norway was so designated on May 30.⁵ On July 17, 1941, a conference was held of the representatives of five governments-in-exile and of various branches of the British Government.⁶ Here there was discussion of a memorandum drawn up for the guidance of the Maritime Courts and authorized prosecutors. Attention was drawn particularly to those aspects of British law and procedure

⁵ Statutory Rules and Orders, 1941, No. 800.

⁶ Record of Conference supplied by courtesy of the Royal Norwegian Ministry of Justice.

which differed from the law and procedure of most European countries. For example, the common European practice of having master mariners sit on these courts with regular judicial officers, apparently seemed to the British rather irregular, but they are not banned. The European institution of *juge d'instruction*, a cross between prosecutor and examining magistrate, could not be fitted in under the Act. British insistence upon regularity in the process of summons and arrest, and particularly upon trying a man only for the offence for which he was arrested, was emphasized. Stress was also laid on the British aversion to trials in the absence of the accused. On the other hand, with reference to the principle *non bis in idem*, Section 3 of the Act merely provides that a British court must "have regard" for any punishment already imposed in respect of that Act by a Maritime Court. Apparently no attention is to be paid to an acquittal by a Maritime Court.

The Norwegian Maritime Courts were established by a Norwegian Order in Council of July 29, 1941. The High Maritime Court sits in London. It is composed of three judges who are judicially trained and four lay judges. The three judicial members constitute also by themselves The Tribunal of Appeal and Complaint, which also sits in London. In addition there are Maritime Courts in London, Cardiff, Liverpool, Glasgow and Newcastle. Each of these courts is composed of one judicially trained judge who at hearings is assisted by two lay judges. The judgment of a Maritime Court may be appealed to the Tribunal of Appeal and Complaint when the appellant alleges that the law has been incorrectly applied or construed, or that the punishment imposed is inadequate or too severe. When the contention is that the findings of the court are erroneous with regard to facts directly relating to the question of guilt, a request for a new trial by the High Maritime Court is the proper remedy. Furthermore a complaint may be filed with the Court of Appeal and Complaint where interlocutory decisions are concerned. This remedy is barred, however, when judgment has been passed, the proper procedure then being either an appeal or a request for a new trial.

The Norwegian Maritime Courts were established with appropriate ceremonies on November 7, 1941. On that occasion, the Norwegian Minister of Justice acclaimed this pioneer work in the field of public international law. The President of the Netherlands Maritime Court, on a like occasion, expatiated on this theme, noting that it marked a vast advance in the practice of respect accorded to foreign judgments.

Special attention should be directed to Paragraph (c) of Section (1) of Clause 2 of the Act which has already been quoted. This permits the Maritime Courts, and in conjunction with them, the enforcement agencies of British justice, to be used to enforce the mercantile marine conscription law of the Power establishing the Maritime Court. This may well prove to be the most important feature of the Act. This collaboration between allies in one of the most vital of the war services bears no resemblance to the old

practice of aiding in the arrest of deserting seamen, a practice abandoned by the United States under the Seamen's Act of 1915.⁷

These Maritime Courts have a status very different from that of the American Army courts which try members of the American expeditionary forces who commit crimes in England. Foreign armies traditionally have an extraterritorial status and this military jurisdiction is not unusual despite the views expressed in the House of Commons.⁸

Since it may well be found to be of common value in the prosecution of the war to duplicate in other countries, such as Canada and the United States, the British practice concerning these Maritime Courts, it is encouraging to note that the system appears to operate without friction. It may be a welcome harbinger of many types of international collaboration in the post-war era.

PHILIP C. JESSUP

A CASE OF INTERNATIONAL RESPONSIBILITY DURING MARTIAL RULE

During a legal state of war there may be martial law in designated areas of a state's own territory or of territory it occupies.¹ In the course of events since December 7, 1941, the legal limits of martial rule have again become the subject of technical discussion.² In general, such discussion has been directed to the municipal law aspects of martial law. A phase of the subject which merits attention, especially in a country where the principle of legality receives the emphasis which it receives in the United States, is the responsibility of a belligerent resorting to martial law as toward the nationals of neutral states. The present comment has to do with a single case of the kind, which arose out of martial law measures during the American War Between the States, and came before the arbitral commission operating under the Treaty of January 15, 1880,³ between the United States and France.

The claim grew out of General Butler's institution and enforcement of

⁷ See I Hyde, *International Law*, Sec. 484.

⁸ See the *New York Times*, Aug. 3 and 5, 1942. Cf. Chalufour, *Le Statut juridique des troupes alliées pendant la guerre 1914-1918* (1927); and Schwelb, "The Jurisdiction over the Members of the Allied Forces in Great Britain," *Czechoslovak Yearbook of International Law* (1942), p. 147.

¹ See, for example, the proclamations of Governor Poindexter of Hawaii, Dec. 7, 1941, texts of which are reproduced in *Calif. Law Rev.*, Vol. 30, at pp. 392-3 (May, 1942).

This type of proclamation is to be distinguished from such a proclamation as that of President Roosevelt, July 2, 1942, denying to a certain category of enemies access to the courts of the United States. Proc. No. 2561, *Fed. Reg.*, Vol. VII, No. 132 (July 7, 1942), p. 5101.

² See, for example, Garner Anthony, "Martial Law in Hawaii," *Calif. Law Rev.*, Vol. 30, pp. 371-396 (May, 1942); Charles Fairman, "The Law of Martial Rule and the National Emergency," *Harv. Law Rev.*, Vol. 55, pp. 1253-1302 (June, 1942).

³ 21 Stat. 673. The purpose of the convention, as stated in the preamble, was to settle claims arising out of the "acts committed by the civil or military authorities of either country . . . during a state of war or insurrection. . . ."

martial law in New Orleans in 1862. France claimed in behalf of Henri Dubos, who was arrested on September 6, 1862, and kept in custody for more than three months for writing and publishing allegedly seditious articles. The latter had appeared in the newspaper *Le Compilateur*. According to claim, Dubos had been held without a hearing or trial, sent "as a criminal" to Ship Island, and subjected to unnecessary hardship and inhuman treatment. The French Agent asked in his behalf \$1,000 for actual loss and \$25,000 for indignities and wrongs, mental and physical suffering, and permanent injury.

General Butler had set forth in his proclamation that no publication, either by newspaper, pamphlet, or handbill, reflecting in any way upon the United States or its officers, or tending in any way to influence the public mind against the Government of the United States, would be permitted. According to his own testimony, the claimant had "probably" mentioned "in a jocular way" the United States Government or General Butler; he had no recollection of having spoken offensively of the Federal Government or its officers in conversation on the streets or elsewhere prior to the time of his arrest.⁴ To the French Consul Dubos wrote on October 10, 1862, from Ship Island, that he had been arrested in consequence of a "semi-burlesque" article. The officer in charge of the French consulate communicated to the Department of State at Washington his belief that Dubos was "more imprudent than guilty," a man who had never had an intention of attacking the Government or the cause of the United States.

The Agent for the United States submitted that "martial law, under every form of government, is a valid system when the emergency exists in the opinion of the constituted authorities for the proclamation of such law," that "it has the same force and the same dignity and authority, and is entitled to the same respect in all courts as any other form of government." Admittedly, it was a "disagreeable, offensive, exceptional condition of things," justified only by a great exigency in public national affairs. Nevertheless, when called into existence by the constituted authorities, it was "entitled to the respect precisely as is that system which we call civil government."⁵ At New Orleans, martial law had been proclaimed. The system of government thereunder was not only constitutional, but "in exact conformity to the law and usage of all civilized nations in modern times." There was, it was argued, a presumption that administration of the law was by due process and in due form. Acts of the commander were to be treated as valid until the contrary should be shown. Dubos was called "an avowed

⁴ A record of evidence and of pleading is in French and American Claims Commission, 1880-1884 (1884), Vol. III. The Dubos claim was No. 26 of the French docket. Boutwell's Report on the work of the Commission is printed as Sen. Ex. Doc. No. 235, 48th Cong., 2nd Sess. The dissenting opinion of Mr. Commissioner Aldis is quoted at some length in J. B. Moore, *International Arbitrations*, IV, 3321-3332.

⁵ The decisions in *United States v. Diekelman*, 92 U. S. 520, and *Cross v. Harrison*, 16 How. 164, were cited in support.

enemy of the United States . . . a sympathizer with the rebellion." The commander at New Orleans, acting according to law, had chosen to keep in his own hands, rather than to entrust to the established military commission, jurisdiction over minor offenses, including that of Dubos.

In reply to the American argument, counsel for the applicant state urged that ". . . the very season when we most need the protection of public law is in time of war. It is then that we are most likely to be unjustly and harshly dealt with, abused and mistreated. It is then that we need to invoke the protection of the strong arm symbolized by the law of nations." The duty of aliens to obey the law did not subject them to arbitrary arrests and imprisonment under either civil, criminal or military law. The French argument was that General Butler had no authority to declare martial law in New Orleans,⁶ and that if he had, he had violated his own regulations. The latter contention seems to have rested upon two considerations. First, General Butler had set up a military tribunal to try "all high crimes and misdemeanors," and Dubos had never had a trial. Second, General Butler had proclaimed that "all foreigners not naturalized . . . will be protected in their persons and property as heretofore under the laws of the United States." This language was taken to mean that aliens of neutral countries would remain under the regular civil law.⁷ The action concerning Dubos was therefore claimed to be "stamped with the worst elements of the abuse of military authority." In the French submissions it was also suggested that counsel for the respondent state might have confused martial law and military law.

The tribunal found that General Butler had authority to declare martial law in New Orleans, that his proclamation was both authorized and justifiable, that it applied to aliens in the city, who were as much bound to obey its regulations as were other inhabitants, that Dubos in publishing the articles had laid himself open to arrest by the military authorities, and that his arrest was therefore justifiable. A majority of the commissioners held, however, that the claimant should have had a trial before the military commission. General Butler had not established an arbitrary government. Rather, he had set up and announced certain "principles and rules of his administration," one of them being that offenders should be tried. Instructions for the government of the United States armies in the field (which became effective in 1863) specified that "Whenever feasible, Martial Law is carried out in cases of individual offenders by Military Courts. . . ." ^{7a}

⁶ It was submitted that the General's "pretended" martial law was illegal "bluster."

The commander's action was apparently approved later by the President and by Congress. For an account of the history of the period, and of some international aspects, see James Parton, *General Butler in New Orleans* (1864), especially Ch. XX.

⁷ The opposing view was that this simply meant that nationals of neutral states would be protected, as theretofore, not that they would be exempt from martial law restrictions.

^{7a} General Orders No. 100, Apr. 24, 1863, Sec. I, 12. There is reason to believe that this was expressive of pre-existing usage. See S. V. Benét, *A Treatise on Military Law* (1866 ed.), pp. 203-4; Halleck, *International Law* (1861 ed.), p. 783.

Furthermore, the Provost-Marshal whom Butler appointed, when notifying the public of his function, drew attention particularly to the prohibition of publishing, in newspapers, notices or resolutions lauding enemies of the United States. The general had, in the opinion of the majority of the commissioners, intervened in this case by dispensing with a trial of Dubos and had violated without necessity his own regulations. There was an award of \$800 plus \$849.86 interest.

Commissioner Aldis dissented. In his opinion, the right to establish martial law having been admitted, the *manner* of its exercise by a state within its territory or that of its enemies could not be questioned by any other state so long as the exercise conformed to the usages of war. The basis for exercise of martial law is the will of the commander. He may or may not, as he thinks best, resort to a commission in order to ascertain the facts. Ordinarily he does resort to one, for he has no time for such trials. The *law* he decides for himself. Accordingly, ". . . where there are no facts in dispute, where the alleged offender admits the facts, there a military commission is not resorted to, because it would be superfluous." Such was the situation, Aldis thought, in the case of Dubos.⁸ The Commissioner in a supplementary opinion observed that ". . . martial law exists, not by any authority derived from the Constitution but by the *laws of war* as recognized by the law of nations, and grows out of war and its necessities." Where it lawfully and necessarily exists, it "sweeps civil law by the board and takes the place of it."⁹

The case of Dubos is, of course, but one of a great number of international cases growing out of the application of exceptional measures to foreigners. Before one commission—that under Article XIII of the Treaty of Washington, 1871¹⁰—there were a hundred claims for arrests or imprisonments carried out wholly or chiefly under conditions of martial rule.¹¹ Too much reliance should not be placed, therefore, upon the Dubos case alone. At the same time, certain questions raised in that case are of continuing importance.

It seems clear that the decision as to the necessity of establishing martial rule in its own territory must rest within the power of any state. The same has been true in the past as to occupied territory. (Any conclusion as to establishment of such a régime in occupied, *i.e.*, another state's territory in the future will necessarily be affected by evolving rules concerning aggression and the legality of use of force as an instrument of mere national policy.)

⁸ It may be argued that there was a "trial" of Dubos before the General himself. It was at Butler's own order that the French writer was sent to the custom-house and later to Ship Island.

⁹ Contrast Robert S. Rankin, *When Civil Law Fails* (1939), *passim*.

¹⁰ 36 Stat. 2415.

¹¹ There were awards in 34 cases. The Commission disallowed 64 claims. Of the remaining two, the Commission dismissed one without prejudice because of improper language in the memorial, and the British Agent withdrew one by leave of the Commission. Hale's Report (For. Rel., 1873, Vol. III), pp. 61-87.

As to what follows the declaration of martial law, the reasoning of the United States Supreme Court in *Sterling v. Constantin*¹² would seem to be applicable to international responsibility as well as to the constitutional limits of executive power, i.e., the rule that there may be judicial inquiry into what is actually done in the course of administering the area under martial rule. That the mere institution of such a régime may not abolish the rights of aliens under customary international law or treaties is elemental.¹³ It is instructive that Commissioner Aldis's dissenting opinion in the Dubos case did not deny that the method of administering martial law might impinge upon rights under international law. Such impingement may consist of arbitrary or unnecessarily harsh treatment.¹⁴ Since national treatment is not everywhere recognized as the maximum which aliens may rightfully expect, the fact that other civilians in the area are subject to equally harsh treatment would not lessen the responsibility toward foreigners.¹⁵

ROBERT R. WILSON

"FRIENDLY ALIENS"

Among the many war problems for which this democracy was not prepared, with lamentable confusion as a result, is the treatment of "enemy aliens" within this country. Difficult anywhere, the problem is especially difficult in the United States because of the vast number of aliens of enemy origin now located within our territory. It would not be an easy task to intern more than a million persons; it would also be unfair, for many of them have a *bona fide* loyalty to the United States and intend to become citizens.

¹² 287 U. S. 378 (1932).

¹³ The United States in the late nineteenth century took the position that its treaty of Jan. 12, 1877, with Spain, prevented martial law or a state of siege (when it was proclaimed in Cuba by the Spaniards) from affecting rights of American citizens. It was contended that there could rightfully be no *incommunicado* imprisonment beyond 74 hours, the maximum permitted under Article IV of the Spanish Constitution of 1876. J. B. Moore, *Digest*, II, 197. The General Claims Commission, United States and Mexico, said, in the case of Joseph A. Farrell, decided in 1930, that the tribunal was "not prepared to state that a law which permits the *incomunicación* of an accused in a manner implying neither cruelty nor interference with the right of defense, is in violation of international law." *Ops. of Commissioners*, Docket No. 282.

¹⁴ The same commission which decided the Dubos claim awarded \$10,000 in the case of Alfred LeMore, who, while confined at Fort Pickens, from Nov. 15 to Nov. 26, was forced to wear a 32-lb. cannon ball and six feet of iron chain. J. B. Moore, *International Arbitrations*, IV, 3311-3313.

¹⁵ On the jurisdiction over persons of the nationality of neutral states who, in territory under military occupation, commit offenses against members of the occupant army, see the note, "*De la juridiction des armées d'occupation en matière de délits commis par des étrangers contre les militaires*," *Clunet*, 1882, 511-520. See also the Volkmar claim before the United States-Venezuelan Commission, in which the tribunal applied the principle that a foreigner domiciled in the territory of a belligerent cannot expect exemption from the operations of a hostile force. *Ralston's Report*, pp. 258-9.

It becomes even more perplexing when one considers that many "enemy aliens" are actually here because they are friendly—because of their bitter opposition to the war-making régime in power in their own nations. Ignorance as to whom to apply—the Department of Justice, the Federal Bureau of Investigation, the Alien Enemy Hearing Boards, the Draft Boards, and other agencies of the government—leaves the alien in anxious uncertainty as to his fate before our laws.

Under traditional international law, a belligerent state is not free to require military service from aliens against their own governments; it is uncertain to what extent other services may be required which are not military but nevertheless assist in the conduct of the war against their own countries. This, however, is the converse of the problem which it is intended to present here. The question here presented is whether an enemy alien may, if he wishes to, take part in work connected with the war effort; and it reduces itself, as a practical matter, largely to a question of classification of certain aliens.

There is a widespread attitude of opposition to "enemy aliens" which deprives many of them of the opportunity to engage in war work. Many employers have a rule against engaging such persons; many workingmen refuse to work alongside them. This is not only traditional, but logical, for a state can not permit its enemies the opportunity to do damage to its war efforts. Against these natural, even praiseworthy, motives there must now be set up new considerations, arising partly from the fact that manpower in this sort of war is badly needed for many purposes other than military, and partly from the fact that many of those who are labeled as "enemy aliens" are in fact sincerely and honestly sympathetic with our war purposes and could be put to profitable use. Thousands of them would work as loyally as would any American to help win the war for us, and to deprive them of the opportunity because they fall under a classification of the past not only means loss to our national effort, but also stultification and frustration for them. They should be encouraged rather than ostracized. When it is recalled that the Germans maintain their industrial war effort largely through the forced labor of their enemies, it seems stupid that we should not be able, against such competition, even to make use of the assistance eagerly volunteered by those who are on our side but are classified by ancient rule as "enemy aliens."

There is little, if anything, in our statutory law to forbid the employment of enemy aliens; the government itself employs them in various capacities. The situation results rather from the distrust felt by an employer, or by the public in general, against anyone officially classified as an enemy alien. The question therefore arises as to whether it would be possible to make a distinction between those persons of enemy origin who can be trusted, and those who must be regarded as dangerous, and against whom we must guard ourselves. The Council for Democracy has proposed, in

order to meet this situation, the creation of a category of "certified" or "friendly" aliens, whose loyalty to the United States should be established by certain tests. These tests could be administered by the Enemy Alien Hearing Boards, and could take into consideration various things, such as length of residence, marriage to an American, intent to become naturalized, and other evidences more directly connected with loyalty to the United States.

Without endeavoring to debate the particulars of this scheme, the general proposal is worthy of consideration. It may not be an easy task to sift the good from the bad, but in so far as it can be done, it would represent a definite gain to all parties concerned. Individually, these aliens would feel relieved from the opprobrium and ostracism which now attaches to their classification as enemy aliens. A bar to their employment would be removed, and they would feel more secure as to livelihood. Above all, they would be given spiritual content and the satisfaction of opposing what they believe to be evil, and of sharing in its defeat alongside others with whom they agree and whom they wish to support. The decision would rest upon each individual, rather than upon an automatic classification based upon origin rather than belief.

From the viewpoint of the national good, the result would be to diminish the amount of discontent and distrust between persons; it would give the employer a wider range from which to draw workers and a greater sense of confidence in those enemy aliens who were officially classified as deserving; it would lessen the problem of mass evacuation or internment, such as that of the Japanese which has caused so much concern; it would to some extent relieve officials of so wide a supervision and watchfulness as now exists; above all, of vital necessity, it would enable the use of thousands of varied skills in the manifold war efforts. Against an enemy who would compel such service, we should be able to avail ourselves of willing offers.

The objections to such a proposal would doubtless lie in the amount of work necessary for the classification, and more especially, in the danger of sabotage or other interference with the national effort. Subject to correction from those who know better than the writer, it does not appear that either of these is important. The work of investigation and supervision is constantly going on now, and would probably be little increased as a result of application from enemy aliens who wish to be classified as friendly. Few effective safeguards now exist, and most of these, if desired, could be continued to guard against danger even from classified aliens. The point is that the mere classification of these persons as "enemy aliens" does not give us protection against them or entail many preventive measures against them. Friends and helpers who are now deprived of an opportunity to serve in a cause in which they believe, and in ways in which they are skilled, deserve a better position in law and in fact.

CLYDE EAGLETON

CURRENT NOTES

THE WORK OF THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW OF THE AMERICAN BAR ASSOCIATION, 1941-1942

By DAVID E. GRANT¹ AND WILLIAM E. MASTERTSON²

THE SECTION'S WAR WORK PROGRAM

Following indications made to the Chairman of the Section by the President of the Association, later culminating in a formal mandate by the House of Delegates, the Section's work during the past year has been distinctly a concentration on a war and post-war program. By a resolution adopted on March 3, 1942, at Chicago, the House of Delegates, after expressing its judgment "that the Section of International and Comparative Law has an unprecedented opportunity for public service in connection with the reconstruction of international law and international relations consequent upon the termination of the present world war," charged the Section "to devote itself, through such committees as the Chairman may deem appropriate . . . to research in and study of such legal doctrines and problems as may seem desirable as basic and fundamental principles for the establishment of peace following the present world war and for the constitution of an international system, founded on law and order, which may assure maximum justice and equity among nations and the maintenance of a permanent international peace." Pending projects of the Section not directly connected with the objectives of this mandate were immediately subordinated thereto.

At a meeting of the Section's Council called to consider the assignment given to the Section by the House of Delegates, it was determined to set up the Section's Committee on International Legal Problems Raised by War Conditions,³ of which Professor William E. Masterson of Philadelphia is Chairman, as the steering or coördinating committee in respect of planning, distribution and supervision of the many aspects of the Section's task. Therefore, until the work gets further under way, the activities of this committee may be considered as the most important in the Section, certainly during the past year. A comprehensive report was rendered by the Chairman and distributed by the Association at the annual meeting held in Detroit

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² Chairman of the Committee on International Legal Problems Raised by War Conditions; Professor of Law, Temple University; author of *Jurisdiction in Marginal Seas* (1929), and numerous articles in domestic and foreign legal and popular magazines and encyclopedias.

³ The members of this Committee are: William E. Masterson, Chairman; Carrol L. Beedy, Joseph W. Bingham, Edwin M. Borchard, Frederic R. Coudert, Theodore S. Cox, Thomas S. Creighton, Jr., William S. Culbertson, Philip C. Jessup, Howard L. Kern, Arnold W. Knauth, James G. Mitchell, and Otto C. Sommerich.

August 24-27 last. Several of the main features of this report are hereinafter summarized.

The Committee lost no time, following the House of Delegates' resolution, in getting under way. Legal problems that had already arisen and those that would continue to arise out of war conditions were numerous and pressing. Their solutions will profoundly affect national and international policies. The American Bar Association is particularly fitted to make studies of these problems and to proffer suggestions or projects for their solution. An unusual opportunity for service to our country is presented to the legal profession today. Some of the members of this Committee, in spite of heavy private professional commitments and diverse civic activities, have given generously of their time, their counsel, and their expert knowledge.

This Committee has held a half dozen well-attended and earnest meetings since its constitution. There have been in addition frequent conferences between its Chairman and the Chairman of the Section and between these two gentlemen and members of subcommittees to which special assignments have been made. From the discussions at these meetings and conferences and from the voluminous correspondence that was carried on between the Chairman and the various members of the Committee, there emerged definite ideas regarding the work that should be undertaken. The final decision of the Committee as to its general objectives and as to the scope of its work is embodied in its report of June 20, already referred to. This report lists some 54 problems for study, research, and recommendations for national and international legislation. The problems are divided into three general groups, namely:

- I. General international legal and political problems of immediate concern.
- II. Particular international legal problems of immediate concern.
- III. Particular international legal problems of less immediate concern.

I. General international legal and political problems of immediate concern.

Among the problems listed under this first group are:

1. The type of international judiciary that will be necessary in the post-war world.

This study will involve an examination of the statute, the decisions, and procedure of the Permanent Court of International Justice for possible revision and clarification. Some attention may be given to the Permanent Court of Arbitration and its present usefulness and accomplishment. The many problems that will arise from the conflict of authority between occupying authorities and governments-in-exile necessitate some kind of international judiciary which can apply to such problems uniform rules of law. The early solution of these problems is essential to the reestablishment and

adequate functioning of the entire business system of Europe and the Orient. Hence, the urgency of this study.

2. The appropriate claims conventions and procedure for international arbitration, such as the Mixed Arbitral Tribunals set up under the Peace Treaties of 1919 and 1920.
3. Executive agencies for the administration of international law and for the execution of judicial decrees.
4. An international coöperative organization.

International law, including an international bill of rights that might well be adopted by the nations after the war, will be impotent without a society that respects it, a judiciary that interprets it, and executive agencies that enforce it. The effectiveness of international law in fact depends upon a competent international organization. International law exists in great abundance. While there is pressing need for a thorough study of many of its rules and doctrines for the purpose of clarifying some of them and of arriving at new conceptions of others in the light of twentieth century developments, the need of a judiciary and an organization to enforce the law is even more urgent, for law can not function in the solution of problems without these. The precise form that the international organization will take—whether it will embrace legislative, executive, and judicial departments—can not now be predicted. It is unthinkable, however, that a society regulated by law can exist without a judiciary, to which nations have become long accustomed, and which has played an indispensable rôle in international affairs in past years.

The American Bar Association, functioning through its Section of International and Comparative Law, the latter coöperating with other distinguished groups and organizations in the field, such as the American Society of International Law, is uniquely in a position to render distinct service, as the House of Delegates of the Association stated, in research and studies as to the organic nature and the structure of possible post-war legal and arbitral tribunals, and for the formulation of plans and projects for their constitution and procedure. This task is peculiarly within the province of those trained in the law and in judicial processes.

5. The creation of respect for and faith in international law.

The Committee deems it of immediate importance and as essential to the accomplishment of our war aims and terms of ultimate peace to inaugurate an educational campaign designed to quicken the consciousness of lawyers and laymen as to the existence, the vitality, and the permanence of international law. This quickened consciousness will restore respect for and obedience to international law and will create a demand for and faith in a post-war set-up that will ensure the enforcement of such law. This will be the chief sanction. This respect for law and this faith in its eternal existence

must be revived before nations can establish on a permanent footing the agencies through which it is to be enforced.⁴

II. *Particular international legal problems of immediate concern.*

Under this group, the Committee has listed 14 subjects, among which are the following:

1. The legal status and validity of decrees and acts of governments-in-exile and of courts functioning in conquered countries under the domination of alien forces of occupation.
2. The validity of anti-religious and anti-racial decrees.
3. The status of aliens and their property under existing laws and regulations of the United States under the Trading with the Enemy Act as amended by the first War Powers Act of 1941.⁵
4. Blacklists, quotas, and navicerts.
5. The doctrine of "non-belligerency."⁶
6. Reëxamination of the privileges and immunities that should be accorded foreign diplomatic and consular representatives in the light of the propaganda and espionage that were carried on in this country in the embassies and consulates of certain foreign countries before they entered the war.
7. Reëxamination of the Covenant of the League of Nations, and a comparison of this Covenant with the Atlantic Charter and President Wilson's Fourteen Points.
8. Preparation of summary of peace aims and peace terms announced from time to time by neutrals and belligerents.

III. *Particular international legal problems of less immediate concern.*

This group consists of 33 subjects for study and research. Among those included are: problems pertaining to international transportation and communication and the advisability of establishing an international agency to supervise and regulate them; the ways and means of eliminating unjust duplication of taxes; the international protection now afforded to industrial property, copyrights, and patents; the present legal status of marginal seas as affected by practices of nations during the present war; the Hemisphere Zone of Security set up by the Pan American Conference;⁷ international penal law and procedure; exploitation of the high seas for fisheries; effect upon the Monroe Doctrine of the seizure of the islands of Miquelon and St.

⁴ On the survival of international law, see: F. R. Coudert, "The Mexican Situation and Protection of American Property Abroad," *American Bar Assn. Journal*, October, 1938; P. C. Jessup, "The Reality of International Law," *Foreign Affairs*, January, 1940, p. 244; W. E. Masterson, "International Law Survives," magazine section of *Christian Science Monitor*, January 27, 1940, and "The Role of Law in International Defense and World Peace," 87 Cong. Record, A5997 (1941).

⁵ John H. Herz, this *JOURNAL*, Vol. 35 (1941), p. 243; A. K. Kuhn, *ibid.*, p. 651.

⁶ Edwin Borchard, this *JOURNAL*, Vol. 35 (1941), p. 618; F. R. Coudert, *ibid.*, p. 429; R. R. Wilson, *ibid.*, p. 121; L. H. Woolsey, *ibid.*, p. 502; Q. Wright, *ibid.*, p. 305.

⁷ T. Baty, this *JOURNAL*, Vol. 35 (1941), p. 227; C. G. Fenwick, *ibid.*, p. 121; W. E. Masterson, *Am. Bar Assn. Journal*, November, 1940, p. 860.

Pierre by the Free French government;⁸ and interference with the mails of neutrals.⁹

This list of 54 highly important and difficult problems, only a few of which can be mentioned here, that must be tackled and ably dealt with is an intimation of the enormity of the work that lies ahead of the American Bar Association, more particularly of the Section of International and Comparative Law, if those charged with the direction of the work rise to the opportunities for service that are presented by the unprecedented conditions of these times. The work that the Committee on International Legal Problems Raised by War Conditions has set for itself naturally contemplates a long-range program to be carried over from one Section administration to another. Progress will be reported through yearly reports and published articles, if not treatises, and by addresses, papers, and discussions presented at meetings of the Section and of the Association. The studies and research will lead to the drafting of model treaties in some instances and to recommendations of national and international legislation in others. In its capacity as the steering or coördinating agency of the Section this Committee has already made assignments to a number of committees, and still others will be made, as the materials are sifted and consideration is given to the question of which committee is best prepared to undertake particular heads of research. Also, this Committee is now engaged in considering plans for more effectively prosecuting this ambitious program of work in coöperation with the Inter-American Bar Association, the Canadian Bar Association, the American Society of International Law, and the Carnegie Endowment for International Peace, through an appropriate liaison committee or otherwise. A considerable volume of reports and recommendations useful to practitioners, scholars and officers of government encharged with foreign relations should be available at the next annual meeting of the Association. And even such volume of material will be but a modest beginning if the officers and the committee members carry through, over several years, with the energy and sincerity that have characterized their efforts to date.

Several preliminary reports by members of this Committee have already been rendered. Dr. Philip C. Jessup, of the Columbia University Law Faculty, submitted a resolution with respect to the establishment of a post-war international judicial system and the coöperation of our own government therein, which was unanimously adopted by the Section at its annual meeting in Detroit and approved by the House of Delegates of the Association. Its text is given, *infra*, p. 683. Mr. Frederic R. Coudert has made a report on "non-belligerency," which traces the evolution of the doctrine of neutrality through its several phases until it was "regenerated" up to the practice of "non-belligerency," which was in vogue in this country before Pearl Harbor. Mr. James G. Mitchell has sent a preliminary report on

⁸ F. R. Coudert, this JOURNAL, Vol. 35 (1941), p. 434.

⁹ Clyde Eagleton, *ibid.*, Vol. 34 (1940), p. 315.

blacklists, quotas, and navicerts, which was incorporated in the report of the Committee on International Legal Problems Raised by War Conditions. A subcommittee, consisting of Messrs. Otto C. Sommerich, Chairman, Thomas H. Creighton, Jr., and Arnold W. Knauth, has rendered a thoroughly considered and documented report on novel concepts and theories as to the status of alien persons and property under the Trading with the Enemy Act as amended by the First War Powers Act, 1941. At the request of the Section Chairman, the Chairman of the Committee on International Legal Problems Raised by War Conditions prepared papers on *The Origin and Permanence of International Law*, which were delivered before the regional meeting of the Association held at New York last May and before the Section at the annual meeting of the Association held in Detroit in August.

SECTION WORK IN GENERAL

The Section's dedication to the particular task assigned to it, as above recorded, by the House of Delegates of the Association, as well as the war emergency which resulted in the withdrawal into the government's civil or armed services of a great number of the committee members, naturally had a profound effect upon the activities and the output of the Section's regular committees. Disruption of normal channels of international communication was another factor in detriment of the Section's output, since the committees in the comparative law field were unable to procure or exchange working data and material.

In consequence of these conditions, a number of the Section's important and usually productive committees, such as those on Comparative Civil and Commercial Law, Comparative Civil Procedure and Practice, Comparative Penal Law and Procedure, Comparative Philosophy and History of Law, Comparative Public Law and Latin American Law, have been virtually inactive during the year. The last named committee, however, although it did not hold formal meetings or arrange for addresses and papers by prominent jurists from Latin America, as it had done in former years, nevertheless submitted six excellent contributions by individual members indicating and discussing recent legislative developments in Chile, Colombia, the Dominican Republic, and Uruguay, as well as in the general field of Inter-American legal trends.

The Committee on Coöperation with the Inter-American Bar Association, under the chairmanship of Mr. George Maurice Morris, of Washington, worked closely with the officers of the Inter-American Bar Association. It rendered valuable assistance in plans and arrangements for the Second Conference of the Inter-American Bar Association scheduled to be held at Buenos Aires in September of 1942, but which unfortunately had to be postponed at the last moment due to insurmountable difficulties of transportation. It was instrumental also in procuring for the Inter-American Bar Association new members among bar associations in the United States.

The Committee on Publications was inactive during the past year because of the superseding authority of the Association's Emergency Committee on Printing Costs and Publication.

DIVISION OF COMPARATIVE LAW

It is in this division that the committees of the Section were more seriously affected by diversion of personnel into government service and the physical obstacles in the way of obtaining and exchanging material, much of which came from abroad. Nevertheless, the Committee on Comparative Social, Labor and Industrial Legislation, two-thirds of whose membership are in full-time government service, has given attention to war-time adjustment and labor legislation enacted in Great Britain as well as to the mass of wholly novel legislative and regulatory measures promulgated in the last few months in our own country and in others of the United Nations. Rationing, price ceilings, export licensing and other instances of drastic state control are being examined, towards synthesizing, if possible, the emergent principles and gauging the extension of established law which such measures signify.

The Committee on Military and Naval Law, under the energetic chairmanship of Major General Edward A. Kreger, of Washington, was most prolific in its activities and output during the past year. As is natural, interest in its field increased, following upon military developments in this country. The committee held six meetings, one for each month from December to May, all in the City of Washington. These meetings were held jointly with the Committee on Military and Naval Law of the Federal Bar Association. At these meetings, in each case well attended, the following papers on questions of moment were received with widespread approval and thoroughly discussed by the members present:

"War Department Contracting in the Present Emergency." Col. Ernest M. Brannon, of the Judge Advocate General's Dept., U. S. Army.

"Selective Service in Total War." Lt. Col. Edward S. Shattuck, General Counsel, Selective Service System.

"Military Justice in the British Commonwealth." Col. William Cattron Rigby, U. S. Army.

"Functions of the Judge Advocate General of the Army with Respect to Military Reservations." Major Tom H. Barrat, Judge Advocate General's Dept., U. S. Army.

"Military Control of Industrial Plants." Major Charles T. Burnett, Jr., Judge Advocate General's Dept., U. S. Army.

"The Writ of Habeas Corpus As Applied to the Army Forces." Col. Erwin M. Treusch, Judge Advocate General's Dept., U. S. Army.

DIVISION OF INTERNATIONAL LAW

Committee on Fisheries, Territorial Waters, and Exploitation of the Seas. This committee, under the chairmanship of Willard B. Cowles, of Washington, D. C., continued its study of problems raised in its field by war develop-

ments and by events centering on the west coast of the United States. It held at least one formal meeting and prepared a report pointing out new problems and conditions which may require consideration by State and Federal legislative bodies as well as by organizations devoted to subjects involving the international law of navigable waters and maritime fisheries.

Committee on International Claims and Arbitral Procedure. The present upheaval in international relations and the disruption of arbitral processes for the settlement of claims manifestly deterred the work of this committee. However, there are being referred to it by the Section's Committee on International Legal Problems Raised by War Conditions, and even by outside organizations through the American Bar Association, questions and topics of research within its field, and it is anticipated that this committee will play an important part next year in connection with the elaboration of the Section's war work program.

Committee on International Double Taxation. Mr. Mitchell B. Carroll, of New York, chairman of this committee, submitted a report which reflects the close attention his committee has given to its field, especially as respects the Western Hemisphere. The new convention between the United States and Canada for the avoidance of double income taxation and related purposes was signed on March 4, 1942, ratified by the United States on May 28 and by Canada on June 11. The committee followed actively the negotiation and consummation of this welcome international adjustment. Its report analyzes this treaty and discusses its probable effects.

Committee on International Law in the Courts of the United States. Although the chairman of this committee, Mr. James Oliver Murdock, of Washington, and a good many of his co-members throughout the United States, found themselves with added burdens during the past year, the committee prepared a full report and distributed additional lists of cases to bring up to date its report of last year on developments in its field.

Committee on International Legal Problems Raised by War Conditions. The enlarged functions and the increased activities of this committee, as well as its place in respect to the Section's war and post-war program, have already been alluded to.

Committee on Laws Relating to the Protection of American Citizens and Their Property in Foreign Countries and on the High Seas. This committee, directed by Mr. James W. Ryan, of New York, chairman, was handicapped by the instability and rapid changes of concept and government policy in its field. Nevertheless, papers were prepared and delivered on specific subjects, and the committee will shortly receive important assignments in connection with the Section's war work program.

Committee on Revision and Codification of United States Nationality and Immigration Laws. Although this committee had but one meeting as a whole, its members, and especially its chairman, Mr. F. Regis Noel, of Washington, D. C., were very helpful to the Section's Chairman and to head-

quarters officials in connection with specific problems arising under the United States Nationality Act of 1940 and related legislation. In one instance the committee was of service to a prominent Cuban jurist seeking information on American immigration policy. This committee will probably be very active next year in connection with assignments made to it under the Section's war and post-war program. Unforeseen developments indicate the necessity for significant changes in existing laws and regulations as to nationality and immigration. Expressions have been received from responsible organizations to the effect that all of our legislation on the subject needs overhauling in view of revelations of the activities of enemy agents under the guise of naturalized citizens and behind the protection of our immigration laws.

Committee on Transportation and Communications. This committee, through its chairman, Mr. Edgar Turlington, of Washington, submitted a report briefly describing recent developments in regard to international air transport services, as embodied in arrangements concluded between the United States and Canada, Panama, Mexico, Costa Rica and others of the American Republics. It is following new problems and questions in its field, precipitated by war exigencies, and the resultant extension of national and international controls.

SPRING SECTION MEETING

For the first time in its history the Section held its spring meeting in the City of Washington in conjunction with the annual meeting of the American Society of International Law. A subcommittee of the Section's Committee on Arrangements for the Spring Meeting was appointed, headed by Chairman Charles E. Pledger, Jr., of Washington, D. C., to collaborate with the officers of the Society towards arranging a joint session. This collaboration culminated in one of the most successful spring meetings which the Section has ever held. The dining hall selected for the luncheon meeting, a spacious one at a leading hotel, proved inadequate to accommodate all of the persons desiring to attend.

At the joint luncheon meeting, presided over by Mr. Frederic R. Coudert, newly-elected President of the American Society of International Law, the following addresses were delivered:

Hon. Francis Biddle, Attorney General of the United States: "War Problems and the American Lawyer."

Hon. Evan E. Young of New York: "International Relations in the Post-war World."

Dr. Philip C. Jessup of New York: "International Law in the Post-war World."

All of the foregoing papers have now been published in the Proceedings of the American Society of International Law.

Following the luncheon, the Section held its own well-attended session at

which, beyond ordinary routine business, problems connected with alien persons and property were discussed as the main theme. As a result of the discussion, a subcommittee of the Committee on International Legal Problems Raised by War Conditions was appointed, under the chairmanship of Mr. Otto C. Sommerich, of New York, to report on the present status of legislation and the pertinent regulations thereunder, with recommendations as to desirable changes or clarifications. The corresponding report was rendered at the annual meeting of the Section at Detroit and has already been referred to.

REGIONAL MEETING IN NEW YORK

In coöperation with the Section on Bar Association Activities of the American Bar Association, the Section participated in a regional meeting held in the City of New York on May 16, 1942. The attendance was surprisingly large considering the season and the selection of a Saturday afternoon for the meeting. The following addresses were delivered and discussed:

"The Permanency and Validity of International Law." Professor William E. Masterson, of Philadelphia, Pa.

"The Evolution of Hispanic American Mining Law." Phanor J. Eder, of New York.

"The Development of Inter-American Tax Law." Mitchell B. Carroll, of New York.

PUBLICATIONS

Owing to the drastic curtailment of Association printing, the Section confined itself to mimeographed releases as much as possible. It did, however, with the approval of the Association's Committee on Emergency Printing Costs and Publication, publish one valuable contribution, namely, Part II of Dean John H. Wigmore's *Guide to American International Law for American Practitioners*, entitled *The Law for a State-of-War*. The Section had published Part I last year.

OTHER ACTIVITIES OF THE SECTION

Throughout the current year, marked by an enormous intensification of Inter-American relations, the Section's Chairman, and many of the committee chairmen and individual members, carried on extensive correspondence with jurists and professional organizations in Latin America as well as with interested members of the bar in the United States. Moreover, the Chairman of the Section delivered ten addresses on inter-American legal topics at bar association and other professional gatherings in Washington, Columbus, Toledo, New York and other large cities. A number of the committee chairmen did likewise with respect to timely problems in the fields of comparative and international law.

In connection with its war work program the Section, through its Committee on International Legal Problems Raised by War Conditions, was in communication with a dozen or more civic, academic and philanthropic organizations interested in related questions. The Section also coöperated with other sections of the Association on aspects of their work which involved international or comparative law. President Armstrong of the Association had repeated occasion during the past year to refer to the Section's officers proposals or inquiries emanating from all parts of our country and from abroad.

SECTION'S ANNUAL MEETING AT DETROIT, MICHIGAN, AUGUST 24-25, 1942

The meetings of the Section of International and Comparative Law were unusually well attended. The large audiences that were present to hear the five major addresses were evidence of the ever increasing interest in the work of this Section in general, and in international law and relations in particular.

Dr. William E. Masterson spoke on "The Origin and Permanence of International Law." This address was designed to correct the general notion that international law ceases to exist when certain nations violate it. "It is generally believed," he said, "that law originates in the 'brain' of judges and legislators and that it is a system of man-made rules." "This theory traces law to human origins, to biological processes, and abandons it to the changes, the instability, and the dissolution of these origins." This is the impossible view of the materialist. "No one will contend that the law of gravity was man-made. It has always existed and functioned as an invariable, wholly apart from the will or inventions of men or changing concepts of what it is or whence it comes. Newton discovered it. . . . This law remains inviolate, unbroken, unbreakable." The laws of mathematics and the natural sciences now employed in the construction of a flying machine have always existed. "Inventors have not made or gradually evolved these laws: they have been centuries in discovering them, and upon their discovery in this age, they are being utilized in the production of the plane. . . . Likewise, the moral law recorded on Sinai antedated time. . . . Moses, the Lawgiver, did not create these rules of behavior: they were revealed to him. They were a discovery." Every true rule of law that we utilize today in the adjustment of the relationships of individuals and of nations is traceable to one of these moral demands that have come down to us through these thirty centuries. Thus, the law of nations that we live under today has always existed and will never cease to exist; disobedience to it no more weakens its vitality or threatens its existence than centuries of disobedience to the Ten Commandments have weakened their vitality or threatened their existence. "It is strange that the scientist has recognized that he is searching for forces that have always existed, while we are slow to see the light as to the origin and eternality of law." "We have as yet but dimly perceived

what law is; that is why decisions have been and are still being overruled and why legal treatises sooner or later become obsolete. We are slowly discovering and working towards this ideal system of law, which will appear to human view with increasing clarity as our mental horizon gradually broadens." Dr. Masterson traced the workings of this idea in human history from the Middle Ages to our own time and quoted eminent jurists of several centuries in support of it.

Finally, he distinguished between the law of peace and so-called law of war, and denied that there is a law of war. "Can nations fight under law or according to law? The only possible effect of law is the establishment of order and the maintenance of harmony and peace. . . . When nations go to war, they depart from the moral order of things established by law; they do not fight under that order. War is thus extra-legal; it is conducted outside the pale of the law."

The international law of peace is on the whole well observed. Thus, it has not broken down even from the standpoint of those who think it can break down. Many people think of international law simply as so many agreements regarding the conduct of war, and conclude that when these agreements are violated, there is no longer any international law. They overlook the fact that the law of nations is the law of peace and that its origin being permanent, it is itself indestructible.

Dr. Masterson's address evoked lively discussion. His general position regarding the origin and permanence of international law was accepted by those who participated in the discussion. However, Colonel Archibald King, of the United States Army, and Mr. George A. Finch, Secretary of the Carnegie Endowment for International Peace and of the American Society of International Law, dissented from his statement that there is no law of war.

Mr. Finch was on the program to lead the discussion. He approached the subject from the point of view that the origin of international law is substantially the same as the origin of all other law, whether it be man-made or positive law, natural or moral law, as, aside from divine revelation, all law is ascertained and interpreted through the practices and customs of men and nations, aided and accelerated more and more in modern times by legislation, which in the international forum is accomplished through treaties, both bilateral and multilateral. There are now in force thousands of such treaties on subjects which touch, directly or indirectly, substantially every phase of the life of the individual, and anyone who doubts the existence of this international law simply does not understand the conditions of the modern world in which he is living. The number of political treaties which are not observed by resort to force in international relationships is insignificant in comparison with the number of treaties in force and observed as a matter of course without the public at large being aware in most cases even of their existence.

Mr. Finch reminded the members of the Section that modern national states and the system of law under which they carry on their intercourse are less than three hundred years old and that the term "international law" itself is less than half of that age. He submitted that during this short period of the existence of the modern international system, such progress has been made in evolving a system of law for the conduct of nations as to compare most favorably with the progress made in evolving laws to govern individuals within states, as, for example, in the more than a thousand years of history during which the common law of the English-speaking countries has been developing. By way of a single illustration of the great progress made in the international field, Mr. Finch referred to modern commercial relations between nations carried on under a network of treaties and customary law, as contrasted with conditions a few centuries ago when all foreign trade was considered contraband and was usually subject to piracy upon the high seas. He stated that greater progress toward more effective international organization has been made during the present century than had been made in all the centuries preceding,—beginning with the Hague Conferences of 1899 and 1907 and extending through the League of Nations, the Permanent Court of International Justice, the International Labor Organization, and even the Kellogg Pact, which, he said, has exerted a powerful influence in shaping the foreign policy of the United States during the present war, especially in the enactment of the "Lend-Lease" law. In his opinion these developments seem likely to lead to another reorientation in the relations between neutrals and belligerents as important as the neutrality policies adopted by Washington and Jefferson during the Napoleonic Wars.

The subject of the paper delivered by Mr. Otto C. Sommerich, of New York, was "Recent Innovations in Legal and Regulatory Concepts as to the Alien and his Property." Mr. Sommerich pointed out that many novel and startling concepts had arisen in connection with the alien and his property. The very definition of "alien enemy" had been drastically recast.

The earliest basic statutory enactment is the Act re Alien Enemies of July 6, 1798.¹⁰ This Act designates as enemies all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward. Under this statute the question has arisen whether an Austrian is a native of Germany. Although the *Department of State Bulletin* of August 1, 1942, at p. 66, regards Austria as not having been legally absorbed into the German Reich, Judge Conger, in the Southern District of New York, recently held that Austrians may be properly apprehended and interned. Even though the Attorney General in a regulation issued by him on February 5, 1942, has permitted Austrians to be exempted from the regulations with regard to travel, etc., he expressly reserved the right to apprehend them under the Act of 1798.

¹⁰ 1 Stat. 577; 50 U.S.C. 21.

A new concept has arisen as to the definition of "alien enemy" based upon loyalty. This concept arises under the Nationality Act, 8 U.S.C. 726, subdivision d, Executive Order No. 9106, excepting certain persons from the classification of "alien enemy" whom the Attorney General of the United States certifies as loyal. This concept of loyalty occurs also in the Final Act of the Inter-American Conference on Systems of Economic and Financial Control,¹¹ wherein the conference recommended the application of economic and financial control of those who, by their conduct, are known to be or have been engaged in activities inimical to the security of the Western Hemisphere.

In connection with actions brought by alien enemies, a new concept is apparent as a result of the decision in the matter of *In Re Bernheimer*,¹² where Judge Biggs, in an opinion of the Circuit Court of Appeals, Third Circuit, adopting the views of the Department of Justice, stated that a suit may be prosecuted on behalf of an enemy even though resident in enemy or neutral territory where adequate measures may be taken to prevent advantage to the enemy.

With the enactment of the freezing orders issued by the Treasury, under Section 5 of the Trading with the Enemy Act, as amended by The First War Powers Act, a new meaning has been given to the expression "national of a blocked country." For example, partnerships, associations, corporations or other organizations, a substantial part of whose obligations have been owned or controlled, directly or indirectly, by nationals of a foreign country, are deemed nationals of a foreign country. In other words, a partnership consisting of American citizens becomes a foreign national merely by reason of the fact that substantial obligations are owing by such partnership to foreign nationals. Furthermore, under Executive Order No. 8785, amending Executive Order No. 8389, the Secretary of the Treasury, without being subjected to review, is given the power to designate an American citizen a national of a foreign country.

Under The First War Powers Act the President is authorized to vest in himself or his agent the property of friendly aliens or friendly alien governments. However, there is no provision for compensation. Under Executive Order No. 9195 the Custodian is authorized to seize foreign owned patents, copyrights, trademarks and foreign ships irrespective of their nationality, whether enemy or not, there being no provision in said Executive Order for compensation. In view of the decision in *Russian Volunteer Fleet v. United States*,¹³ holding that the property of a friendly foreign government can not be seized under the Fifth Amendment to the Constitution without a provision for compensation, it is doubtful whether The First War Powers Act and the aforesaid Executive Order in this regard are constitutional.

¹¹ See Final Act published by the Pan American Union, Washington, D. C., 1942, Congress and Conference Series No. 39, p. 16.

¹² 11 U. S. Law Week, 2127.

¹³ 282 U. S. 481; this JOURNAL, Vol. 26 (1932), p. 159.

Another new concept has resulted in connection with attachments levied on frozen funds. The Treasury Department has ruled that although an action in which a warrant of attachment has been obtained may proceed to judgment, such judgment should not be paid out of the frozen funds but the payment of such debt should await the termination of the war and the marshalling of claims, private and public. In view of the fact, however, that if the frozen funds would be taken over by the Custodian a claim for the indebtedness owing to a non-enemy may be filed under Section 9 of the Trading with the Enemy Act, the ruling of the Treasury Department seems of doubtful validity.

Still another new concept is seen in connection with the filing of claims against property seized by the Custodian under vesting orders. The regulations provide for the creation of a committee to consider such claims and for the making of a report on the part of such committee, which report may be adopted or rejected by the Custodian. There is no provision made for the judicial review of the decision of the Custodian.

Executive Orders No. 9066 and No. 9102¹⁴ authorizes the Western Defense Command to issue orders excluding persons of Japanese ancestry from specified military areas. Thus, a new concept affecting the alien based upon ancestry is created.

In the case of *Anderson v. N. V. Transandine Handelmaatschappij*,¹⁵ the Court of Appeals held that the Netherlands Royal decree of May 24, 1940, operated to bar the levy of an attachment by the assignee of a creditor of the former owner of the property located here. This is contrary to the former concept that decrees of foreign governments are not to be recognized as transferring proprietary rights if the property is located in this country.

In leading the discussion on Mr. Sommerich's paper, Mr. Arnold W. Knauth of New York, made the following comment: It is striking that these new war laws, enacted in great haste, are aimed not only at *enemy* aliens, but also at *friendly* aliens—i.e., at aliens generally. This is a novelty, especially in a world where non-enemy aliens have already fallen into three groups: those who are fighting on our side, those who, while neutral, grant us non-belligerent rights, and those who are neutral in an impartial or even pro-Axis sense. Congress has lumped them all as aliens, leaving it to the Executive to sort them out, each according to his true character. This gives the Executive a tremendous power, and while one of course has faith it will be fairly exercised, thoughtful citizens and especially lawyers are justified in watching the manner in which these powers are exercised and doing what is possible to check abuses and ameliorate hardships. The war must be won, else there will be no liberties to discuss; and the fine arts of infiltration and undercover sapping, the Quisling demonstrations, the records of fair

¹⁴ C.C.H. War Law Service 8066.

¹⁵ 289 N. Y. 9; this JOURNAL, *infra*, p. 701.

promises and ruthless performances of our foes, now spread for all to see, require counter-measures of a sharpness unusual in our make-up, foreign to our normal character, displeasing but necessary.

Even more alarming than the power given to tie up non-enemy aliens is the power lodged in the Secretary of the Treasury to declare that a citizen is, in some aspects of his life and activity, so connected with an alien that the citizen can, by decree or fiat, be declared *pro tanto* an alien, and tied up like an alien. This is, indeed, drastic; and no method of appeal is provided. Mr. Sommerich mentions the case of the eight saboteurs. The disturbing thought presents itself that the Executive can seize persons—citizens and aliens indifferently—anywhere in the country, and while the civil courts are freely open and functioning, and try them in camera by military commission. The Supreme Court has promised its considered opinion on the matter; and this is now awaited. The whole story has obviously not yet been told. Mr. Mitchell Carroll's supplementary remarks emphasize the threat of these concepts and policies as to property rights and foreign investments. The two-fold character of this highly important subject is thus displayed: Our alien property laws, decrees and regulations concern both the liberties of the individual and the basic rights of property. The matter is of the profoundest importance.

An inspiring address was delivered by Dr. Ricardo J. Alfaro, former President of the Republic of Panama, at the annual luncheon of the Section. His general theme was the "solidarity and good neighborliness" of the Americas, which in the world conflagration now engulfing the Western Hemisphere "cannot but bring about a deeper realization of the blessings that we, the people of the American continent, enjoy as between ourselves." Living in peace among themselves, the 21 American Republics are "determined to preserve that peace, to respect the independence and the territorial integrity of every one of them, and to cherish and defend those ideals of freedom and self-government which are their political heritage." Dr. Alfaro stressed the point that America is the only continent where diplomatic representatives of all sovereign nations meet regularly every five years in some American capital, every month in Washington at the Pan American Union, and occasionally wherever necessary, to consider questions of common concern. "It is the only continent where we can observe that peculiar sentiment of solidarity, of a community of interests and ideals by which we are differentiated from all other continents. . . . We have thus set up a system of international coöperation such as is not found anywhere else or in any epoch of history." Since the American Republics are not united by treaties or an alliance, their union is simply called a "moral union." "Yet," he continued—

our union is strong; it has proved to be stronger and has lasted longer than any political union known, because its strength rests upon the principles that all states are equal, that justice is the vital element of

peace, that all civilized peoples have the inherent right to govern themselves, and that no doctrine is acceptable to the human spirit if it is predicated upon the destruction of the human personality. The current of rapprochement flowing between the northern and southern countries . . . must have its source in the intelligence and in the hearts of the people. A strictly diplomatic and formal Pan Americanism will always be weak. . . . We must not be satisfied with military defense and conquering markets. We must conquer the souls of America for the American ideals. For this reason cultural interchange has a paramount importance in Pan Americanism.

The Americas will meet the present challenge to democracy by fighting not only "a material but also an ideological war against tyrants, by imbuing the citizens of today and tomorrow with the duty of defending the principles underlying our social and political organization." Dr. Alfaro called attention to the fact that at the Rio de Janeiro Conference, the 21 republics of this hemisphere unanimously agreed upon 41 resolutions dealing with questions of hemisphere defense. "I do believe," he concluded, "that a policy of real neutrality, as defined by international law, is incompatible with their inter-American commitments. . . . I am convinced, furthermore, that both the Chilean and Argentinian peoples are overwhelmingly pro-democratic and that internal and external developments are accelerating for their governments the hour of decision. . . . The structure of Pan Americanism stands unshaken. . . . America once more is united in front of the European and Asiatic despots. America is unflinchingly resolved that nazism and fascism be wiped from the face of the earth."

Hon. Amos J. Peaslee spoke on "A Permanent United Nations." The following quotations from his most interesting and well-received address furnish an adequate summary of it:

It may be accepted as a major probability that an effort will be made at the conclusion of this war—more determined than at Vienna in 1815, or at Paris in 1919, or at any of the Pan American Conferences—to set up stronger permanent organs of international government.

* * *

It may be no more possible to abolish war and war worshippers than to abolish crime and criminals, but it is possible to outlaw and to control them through permanent organs of the International Community *strong enough to do that job.*

* * *

Permanent organs of World Government are needed for other purposes, too. Not only Axis Powers but many other national governments, including our own, have enlarged their peace time functions into a vast control of domestic and international economy. They have become tremendous business enterprises. No existing organs of government have any possibility of dealing adequately or fairly with the civil controversies which are bound to increase with that expansion.

A complete written constitution for the United Nations seems desirable for several reasons:

(1) It could declare at the outset accepted sovereign rights which may not be infringed.

(2) A written World Constitution could declare precisely what permanent organs of world government are to be sanctioned and clothed with effective powers and given adequate means of financial self-support.

(3) Written Constitutions containing bills of rights have grown apace among nations in recent years. The growth is significant in indicating public confidence in them.

* * *

The United States already participates in at least 29 international administrative agencies. It would not be particularly revolutionary to place those various organs, as well as some others, under control of a permanent organization of the United Nations.

Fortunately we have a hundred and fifty years of experience with international judicial procedure in the modern world. We have operated under many claims commissions and arbitral tribunals. Lawyers are not impressed with the objection occasionally offered that the founding of permanent International Courts must await the codification of International Law. If that theory had been followed in municipal law there would still be no domestic courts in many of the most highly civilized states and nations of the world.

If the Post War Conference creates a self-contained World Authority and not a mere concert of powers or weak confederation, it will avoid the errors of 1815 and 1919.

The basic problems of the Post War Conference on Permanent Organization will—if that conference is happily guided—be problems of Constitutional and International Law.

In leading the discussion which followed, Mr. James G. Mitchell, of New York, urged the necessity of a thorough comparative study, to begin immediately, of the constitutions of the leading United Nations, in order to ascertain the extent and the nature of the modifications which may be necessary to realize any project of federation or other superstructure to hold together as a working unit the democratic countries of the world and to form the nucleus of a post-war community of nations. He indicated the great delay and the possible dissension which might ensue if the ground were not prepared in advance and if the authorities arranging the peace do not have before them some clear and concise conception of how their respective basic laws would be affected by proposals for federation or unity.

Discussion from the floor gave promise of such length and intensity that the Chairman was constrained to order the discussion closed in order to assure conclusion of the entire program within reasonable bounds of time.

Following Mr. Peaslee's contribution on the afternoon of Tuesday, August 25, Professor Edwin Borchard, of Yale University Law School, delivered a paper on "The Place of Law and Courts in International Relations." In characteristically direct and realistic fashion, Dr. Borchard took issue with

those who gauged the efficiency of international courts and tribunals, and instrumentalities for the enforcement of their decrees, from the standpoint of abstract theories. In a sense his point of view was the direct antithesis of that presented by Professor Masterson on the previous afternoon in the latter's paper on "The Origin and Permanency of International Law."

Professor Borchard indicated that international legal tribunals would have to be constituted to work up from experience in the past instead of to work down from theories as yet unproved. He cited the tragic results of the application of sanctions and dwelt upon the natural resentment which would inevitably arise on the part of particular nations whose acts and policies were to be judged by foreign authorities. He accentuated the deeply rooted concepts of sovereignty and national pride which had actuated nations in all of their dealings and pointed out the enormous difficulties facing the institution today of a system of international police. The application of force, he maintained, in connection with the decrees and judgments of an international judicial body, would but merely plant the germs of further movements for revenge and might very well engender secret combinations and conspiracies for the seizure of international control by one group or another. Nations in that respect were no more immune from political intrigue than individuals of one country.

By implication, if not expressly, Dr. Borchard condemned international meddling in the past, although he admitted that many of the tragic results may have been due to avarice and selfishness on the part of powerful nations, as well as to unintelligent and shortsighted planning for the future.

His address, though superficially disheartening to many of the proponents of a post-war international structure, was, at heart, an admonition or a warning that the obstacles were titanic and that above all it was necessary to avoid half-baked schemes or advance commitments to set up projects on the basis of the shortest possible time instead of upon mature experience.

As was natural, Dr. Borchard's talk precipitated lively, and at times acrimonious, discussion, most of it in disagreement with his point of view. The sense of those opposing his thesis was that a well-conceived and thoroughly international-minded world organization had never in fact been tried; that it was no more to be expected to conceive and establish at first hand a workable community of nations, without first a necessary trial and error period, than it was to establish a satisfactory government in any nation or other homogeneous society. Our own government was the result of trial and error and evolution had as much application to international affairs as it had to domestic. It was urged that if the world never started, or having failed, never started over again, we should never advance, and that by holding back its cooperation a nation was retarding the progress of the world immediately and of itself in the long run.

The Chairman, in summarizing the discussion, in the absence of Professor Philip C. Jessup, of Columbia University Law School, who was unable to

attend, endeavored to point out that there was nothing necessarily inconsistent between the two principal points of view expressed; that Professor Borchard merely desired an evaluation of the problems in terms of reality, with due respect for the enormous obstacles in the way of any international scheme. In the view of the Chairman there was nothing which absolutely precluded post-war reconstruction, in the point of view of Dr. Borchard, but that it could not be accomplished in haste or by any schemes or methods not readily flexible or adaptable to changing conditions and to the results of experience.

As the last order of business, before proceeding to the election of the officers of the Section for the ensuing year, the Section discussed and, after deliberation, unanimously adopted the following resolutions, all of which were approved by the House of Delegates of the Association at its meeting on August 27, 1942:

RESOLUTIONS ADOPTED

Resolution re Permanent Court of International Justice

WHEREAS, The American Bar Association at its 54th Annual Meeting in 1931 adopted a recommendation of its Committee on International Law reading as follows:

Your committee, believing that the Permanent Court of International Justice is the greatest of international instrumentalities for the preservation of peace and of justice between nations, recurs to the approval given to the participation of the Government of the United States in the World Court, upon the terms and conditions set forth in the Protocol of Accession of the United States. It requests the American Bar Association to reaffirm at its forthcoming session in Atlantic City the action taken at the meeting of the Association in Memphis in 1929; that the Government of the United States shall adhere to the Permanent Court of International Justice, upon the terms and conditions as stated in the Protocol of Adherence, to which it is a signatory; and the Association respectfully requests and earnestly urges the Senate of the United States to advise and consent to the Protocol of Signature of the Statute of the Permanent Court of International Justice, executed December 16, 1920, to the Protocol of Revision of the Statute of the said Permanent Court, and to the Protocol of Accession of the United States, signed September 14, 1929, to which the Government of the United States became a signatory on December 9, 1929, which protocols were transmitted to the Senate on December 10, 1930 by the President of the United States.

WHEREAS, in the ensuing years and at this time it has become apparent that the United States must play a responsible part in the establishment and operation of international institutions designed to promote the principles of international democracy and the common welfare of mankind, and

WHEREAS, the civilized world should build upon the experience acquired in the operation of such institutions as the League of Nations, the International Labor Organization and the Permanent Court of International Justice and the Pan American Union, and should preserve the achievements of those organizations while correcting their deficiencies,

Be it Resolved, that the American Bar Association reaffirms its confident belief in the necessity and practicability of international tribunals which will apply and develop international law; asserts the desirability of the United States at the earliest opportune time declaring its confidence in this principle and in the only permanent court which the ingenuity of man has hitherto devised, namely, the Permanent Court of International Justice, which even today could be utilized by the United States; and endorses the view that means should be devised to establish and maintain in the post-war world an adequate international ju-

dicial system to the end that the rule of law may be established among as within nations, and it asserts the desirability of the coöperation of the United States in the establishment of such a system.

Resolution re Section Dues

WHEREAS, by reason of the present international situation and the necessity for planning a post-war reconstruction in the field of international law, the work of the Section of International and Comparative Law has become greatly amplified in its scope and has attained unprecedented prominence and importance; and

WHEREAS, it is no longer possible for the Section to carry on the details of its administration, correspondence and publication within the limited amount of the appropriation which the Association is able to allow it out of its general funds; and

WHEREAS, other important Sections of the Association have long been successfully conducted on a dues-paying basis which has enabled them to be of increased service to their membership, the Association and the profession as a whole,

Now, therefore, be it resolved, that Section 1 of Article II of the Section's By-laws be amended retroactively as of October 1st, 1941, to read as follows:

ARTICLE II

MEMBERSHIP

SECTION 1. Each member of the Section shall pay to the American Bar Association annual dues of two dollars. Any member of the Association, upon request to the Secretary of the Association and upon payment of dues for the current year, shall be enrolled as a member of this Section. Thereafter said dues shall be paid in advance each year beginning on the July first next succeeding such enrollment. Any member of this Section whose annual dues shall be more than six months past due shall thereupon cease to be a member of this Section. Members so enrolled and whose dues are so paid shall constitute the membership of this Section.

Resolution re Existence, Permanency and Validity of International Law

WHEREAS the lawlessness and the inhumanity on the part of the so-called Axis Powers which has characterized the present World War has resulted in the total disregard of long established and cherished principles of international law, and

WHEREAS the repeated and flagrant violation of international law has given rise in many quarters to the fallacy that because it is violated international law has ceased to exist; and

WHEREAS, as a matter of fact, the hope of mankind and the post-war reconstruction of the Community of Nations depends upon the vindication and the reign of international law;

Now, therefore, be it Resolved that the American Bar Association affirms its devotion to and its faith in the existence, permanency and the validity of international law and the law of nations as the fundamental basis for regulating international relations.

Resolution re Study of Latin American Law

WHEREAS recent Inter-American conferences as well as international business and professional gatherings have recommended efforts by qualified groups towards the simplification and unification of the civil and commercial laws of the American Republics; and

WHEREAS the Pan American Union has, for many years encouraged and assisted in the comparative study of the juridical systems of the United States and of the Latin American countries and now offers its resources and experience in coöperation with bar association groups which may be organized to work for the ends above mentioned;

Now, therefore, be it Resolved by the House of Delegates of the American Bar Association that state and local bar associations throughout the United States be urged to appoint special committees to undertake a study, by such means as may be available to them and in coöperation with the Inter-American Bar Association and the Pan American Union, of the important similarities and differences between the juridical system and the jurisprudence of the Latin American countries and that of the United States, towards the objective of gradual unification or coördination and simplification of the civil and commercial law among all of the American Republics.

Resolution re Alien Persons and Property

WHEREAS recent legislation on the subject of alien persons and property has introduced innovation in concepts and principles of drastic and far reaching effect; and

WHEREAS several agencies of the Federal Government are presently engaged in formulating under such recent legislation, more especially the Office of Alien Property Custodian, and the said regulations involve novel and far reaching problems of interpretation and application of law; and

WHEREAS the Committee on International Legal Problems of the Section of International and Comparative Law has appointed a subcommittee of independent experts on the subject of alien persons and property, which has rendered a most comprehensive and constructive report; and

WHEREAS the office of Counsel to the Alien Property Custodian has manifested interest in the work and the opinions and suggestions of the aforesaid subcommittee;

Now, therefore, be it Resolved that the subcommittee on Alien Persons and Property of the Section of International and Comparative Law of the American Bar Association be, and it hereby is duly authorized under the supervision of the Association's Committee on Coördination and Direction of the War Effort to confer informally with the appropriate Government agencies and to lend assistance thereto in connection with the formulating of regulations on the subject of alien persons and property, it being understood that such recommendations and suggestions as the said subcommittee may proffer or such opinion as it may express, are unofficial and do not necessarily represent the official or approved recommendations, suggestions or opinions of the Section of International and Comparative Law or of the American Bar Association.

Resolution re Territorial Waters and Exploitation of Fisheries

WHEREAS, the present World War will inevitably result in far reaching changes in the principles and practices of international law, and it is the hope of the American Bar Association that it may contribute toward guiding the development of new principles and practices along sound, practical and coöperative lines; and

WHEREAS, the duration of the war is of such uncertainty that it is desirable to put into immediate effect such improvements in international relations as are possible, both for the purpose of obtaining the immediate benefit therefrom and for the purpose of giving a background of experience for any future general revision of international law; and

WHEREAS, the international law applicable to ocean fisheries affords an exceptional field for such immediate development because (1) there is practically universal recognition of the unsoundness of present principles and practices, (2) Canada and the United States have already led the way for coöperative action in this field, (3) the Latin American countries have never acceded to the so-called "three-mile" rule of territorial waters and should therefore be receptive to proposals which might be tried out on a hemispheric scale, (4) through the Inter-American Bar Association we now have a medium of presentation of such proposals to all the nations of North, Central and South America, (5) the presentation, development and rational exploitation of ocean fisheries is of immediate war concern because of the importance of this enormous food resource in our war economy;

Now, therefore, be it Resolved that:

1. The American Bar Association as a member of the Inter-American Bar Association propose to that Association the immediate consideration of the matters above referred to, and
2. That if such proposal be accepted, the Committee on Fisheries, Territorial Waters and Exploitation of the Seas of the Section of International and Comparative Law be authorized and directed to tender its service and coöperation to the Inter-American Bar Association.

The following officers for the ensuing year were elected by the Section: Chairman, Edward W. Allen, of Seattle; Vice-Chairman, Mitchell B. Carroll, of New York; Secretary, Willard B. Cowles, of Washington.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16-AUGUST 15, 1942
(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

March, 1942

- 23 CHILE—MEXICO. Signed trade treaty at Mexico City. *P. A. U.*, August, 1942, p. 471.

April, 1942

- 29/June 9 FREE FRENCH RECOGNITION. Cuba recognized Free French movement on April 29. *B. I. N.*, May 16, 1942, p. 440. Egypt recognized Free French delegation in Egypt on June 9 and announced the leader will receive diplomatic privileges, although not having ministerial rank. *Free France* (N. Y.), June 15, 1942, p. 128; *London Times*, June 9, 1942, p. 4.

May, 1942

- 5 GREAT BRITAIN—NETHERLANDS (in exile). Signed military agreement in London. *B. I. N.*, May 16, 1942, p. 452.
- 5 ICELAND—UNITED STATES. Signed exchange stabilization agreement. *D. S. B.*, July 11, 1942, pp. 623-624.
- 12 GERMANY—POLAND (General Government). German-dominated Government General decreed that all the non-German population between 18-60 years in the General-Government of Poland, excepting Jews and gypsies, were to be enrolled for "reconstruction services" in the Baudienst. *B. I. N.*, May 30, 1942, p. 502.
- 16 WORLD WAR II. Department of State issued a chronology of events, Dec. 7, 1941-April 30, 1942. Text: *D. S. B.*, May 16, 1942, pp. 428-433.
- 17 COSTA RICA—HUNGARY. Costa Rica cancelled exequaturs of the Hungarian consulates. *N. Y. Times*, May 18, 1942, p. 6.
- 17 COSTA RICA—SWEDEN. Costa Rica cancelled exequaturs of the Swedish consulates. *N. Y. Times*, May 18, 1942, p. 6.
- 18 PANAMA—UNITED STATES. Signed agreement at Panama concerning the use of Panama defense areas by United States forces. *N. Y. Times*, May 19, 1942, p. 11. Text: *D. S. B.*, May 23, 1942, pp. 448-452.
- 20 CANADA—FRANCE (Vichy). Canadian Government asked Vichy to close its consulates. *N. Y. Times*, May 21, 1942, p. 8.
- 22 LEAGUE OF NATIONS—AUSTRALIA. Announcement made of decision to maintain Australia's membership and to pay a contribution to the League. *London Times*, May 23, 1942, p. 3.

- 22/June 5 WAR DECLARATIONS. On June 1 President Avila Camacho of Mexico signed a declaration of war against the three Axis Powers, effective as of May 22. *N. Y. Times*, June 2, 1942, p. 1; *D. S. B.*, June 6, 1942, p. 505. The United States declared war on Bulgaria, Hungary and Rumania on June 5. *D. S. B.*, June 6, 1942, p. 510.
- 23 PRISONERS OF WAR. Department of State issued statement regarding treatment accorded civilian enemy aliens and prisoners of war. *D. S. B.*, May 23, 1942, pp. 445-447.
- 26-June 24 GREAT BRITAIN—SOVIET RUSSIA. Signed mutual assistance pact on May 26 in London, to last for at least 20 years. *Russian Embassy Information Bulletin* (Washington), June 13, 1942, No. 71. Texts of White Paper, treaty, Eden's speech: *London Times*, June 12, 1942, p. 5; *N. Y. Times*, June 12, 1942, p. 3; *Russia*, 1942, No. 1 (*Cmd.* 6368); *Inter-Allied Review* (N. Y.), June 15, 1942, pp. 113-115. Russia ratified the pact on June 18. *N. Y. Times*, June 19, 1942, p. 1; *London Times*, June 19, 1942, p. 4. Great Britain ratified June 24. *N. Y. Times*, June 25, 1942, p. 3; *London Times*, June 25, 1942, p. 4. Summary: *B. I. N.*, June 27, 1942, pp. 565-567.
- 27-June 9 INTER-AMERICAN CONFERENCE ON POLICE AND JUDICIAL AUTHORITIES. Met at Buenos Aires. Summary of resolutions adopted: *N. Y. Times*, June 10, 1942, p. 4. Final Act (Spanish): *P. A. U. Congresos y Conferencias Ser.* No. 39.
- 29 COLOMBIA—UNITED STATES. Signed military mission agreement at Washington, effective for four years. *D. S. B.*, May 30, 1942, p. 501; *N. Y. Times*, May 30, 1942, p. 12.
- 29 ECUADOR—PERU. Protocol for delimitation of common frontier, signed Jan. 29, 1942, now in effect. United States Department of State announced appointment of George M. McBride as technical adviser to the Boundary Demarcation Commission which was to hold its preliminary session at Puerto Bolivar, Ecuador, June 1, 1942. *D. S. B.*, May 30, 1942, p. 496.
- 29 MOLOTOFF, VLADIMIR M. Foreign Commissar of Russia arrived in Washington and was a White House guest for several days. *D. S. B.*, June 13, 1942, p. 531.

June, 1942

- 2 CHINA—UNITED STATES. Signed lend-lease agreement at Washington. *N. Y. Times*, June 3, 1942, p. 7. Text: *D. S. B.*, June 6, 1942, pp. 507-509; *Inter-Allied Review* (N. Y.), June 15, 1942, p. 125; *Ex. Agr. Ser.* No. 251.
- 4 BELGIUM (in exile)—GREAT BRITAIN. Signed military and economic pacts in London. *N. Y. Times*, June 5, 1942, p. 7; *London Times*, June 5, 1942, p. 3. Text: *G. B. T. S.*, 1942, No. 1 (*Cmd.* 6365).
- 5 BULGARIA—TURKEY. Signed agreement regulating technical questions connected with resumption of railway communications between the countries, following difficulties over 30-mile wide stretch in Western Thrace. *B. I. N.*, June 13, 1942, pp. 545-546.
- 5 POISON GAS. President Roosevelt warned that if Japan should continue the use of gas against China or any other United Nation, the United States would adopt the same measures. Text: *D. S. B.*, June 6, 1942, p. 506.
- 6 ATLANTIC CHARTER—MEXICO. Mexico notified representatives of all countries with which it has diplomatic relations that it adhered to the Atlantic Charter. *B. I. N.*, June 13, 1942, p. 543.

- 6 FRANCE (Vichy)—SWEDEN. Announced barter agreement, exchanging French wine for Swedish iron, machines, staple products and food. *N. Y. Times*, June 7, 1942, p. 4.
- 9 CHINA—VATICAN. China announced appointment of its first Minister. *N. Y. Times*, June 10, 1942, p. 6.
- 9 GREAT BRITAIN—UNITED STATES. Announced formation of a Combined Production and Resources Board, and a Combined Food Board. *N. Y. Times*, June 11, 1942, p. 10; *D. S. B.*, June 13, 1942, p. 535; *Inter-Allied Review* (N. Y.), June 15, 1942, pp. 116-117.
- 10 CZECHOSLOVAKIA (in exile)—POLAND (in exile). Issued joint communiqué in London announcing convocation of four mixed commissions to study economic, military, cultural and social organization of confederation. *London Times* June 11, 1942, p. 3; *B. I. N.*, June 27, 1942, p. 578. Text: *Inter-Allied Review* (N. Y.), June 15, 1942, p. 118.
- 11 SOVIET RUSSIA. In a note to all nations with which Russia has relations, Soviet Foreign Commissar Molotov accused the German Government of a policy of exterminating war prisoners. *N. Y. Times*, June 12, 1942, p. 9.
- 11 SOVIET RUSSIA—UNITED STATES. Signed lend-lease agreement at Washington, pledging mutual aid in the war and postwar economic collaboration. Text: *D. S. B.*, June 13, 1942, pp. 532-534; *Inter-Allied Review* (N. Y.), June 15, 1942, pp. 115-116; *Russian Embassy Information Bulletin* (Washington), June 13, 1942, No. 71; *N. Y. Times*, June 13, 1942, p. 6. Exchanged notes declaring previous arrangements on the same subject inoperative. Texts: *D. S. B.*, June 13, 1942, pp. 534-535.
- 12 AXIS POWERS (3)—MEXICO. Mexican presidential decree put into force a law, effective June 13, permitting formal confiscation of all properties belonging to subjects of Axis Powers. *N. Y. Times*, June 13, 1942, p. 5.
- 12 CANADA—SOVIET RUSSIA. Signed agreement in London to resume diplomatic relations broken off six years ago. *N. Y. Times*, June 13, 1942, p. 6.
- 12 FRANCE (Vichy)—UNITED STATES. Secretary of State Hull announced resumption of trade with French North Africa, suspended since mid-April. *N. Y. Times*, June 13, 1942, p. 7.
- 13 GERMANY—IRELAND. Irish Information Bureau announced that the Chargé d'Affaires in Berlin had been instructed to protest sinking of Irish vessel *City of Bremen*, on June 5, and to claim full compensation. *B. I. N.*, June 27, 1942, p. 579.
- 14 UNITED NATIONS DECLARATION. Mexico and the Philippine Islands signed the Declaration at Washington. *N. Y. Times*, June 15, 1942, p. 1. Mexico adhered by telegram on June 5, and the Philippine Islands on June 10. *D. S. B.*, June 20, 1942, pp. 546-548. Texts of communications: *Inter-Allied Review* (N. Y.), June 15, 1942, pp. 117-118.
- 15 ARGENTINA—GERMANY. Germany warned Argentina that all vessels entering the North American blockade zone after June 26 would do so at their own risk. *B. I. N.*, June 27, 1942, p. 581.
- 15 CANADA—UNITED STATES. Exchanged ratifications of convention and protocol for avoidance of double taxation, signed at Washington, March 4, 1942. They came into force retroactively. Proclaimed June 17 by President Roosevelt. *D. S. B.*, June 20, 1942, p. 557. Text: *U. S. T. S.*, No. 983.

- 15 CHILE—GERMANY. Germany warned Chile that all vessels entering the North American blockade zone after June 26 would do so at their own risk. Germany also protested comments in Chilean press. *B. I. N.*, June 27, 1942, pp. 577-578.
- 16 BELGIUM (in exile)—UNITED STATES. Signed lend-lease agreement at Washington. Text: *D. S. B.*, June 20, 1942, pp. 551-553; *Belgium* (N. Y.), July, 1942, pp. 261-262.
- 16-August 12 RUBBER AGREEMENTS. Signed by representatives of the United States and other countries as follows: Costa Rica, June 16, *D. S. B.*, June 20, 1942, pp. 554-555; Colombia, July 3, *D. S. B.*, July 4, 1942, p. 596; Bolivia, July 15, *D. S. B.*, July 18, 1942, p. 633; Ecuador, July 21, *D. S. B.*, July 25, 1942, p. 650; Honduras, Aug. 3, *D. S. B.*, Aug. 8, 1942, pp. 690-691; Trinidad and British Guiana, Aug. 12, *D. S. B.*, Aug. 15, 1942, p. 698.
- 17/July 7 ARGENTINA—GERMANY. Argentine Foreign Office announced receipt of a note acknowledging responsibility for torpedoing the Argentine tanker *Victoria*, and offering indemnity. *N. Y. Times*, June 18, 1942, p. 11; *C. S. Monitor*, June 18, 1942, p. 1; *B. I. N.*, June 27, 1942, p. 581. On July 7 the Argentine Foreign Minister announced his Government considered the dispute over the sinking of the *Rio Tercero* as a closed incident, following receipt of a German expression of regret and offer of compensation. *B. I. N.*, July 25, 1942, p. 665; *N. Y. Times*, July 7, 1942, p. 8.
- 18 ATROCITIES—CZECHOSLOVAKIA (in exile). The Czechoslovak Government announced decision to set up courts after the war to try all Nazis responsible for atrocities at Lidice and elsewhere in Czechoslovakia. *C. S. Monitor*, June 18, 1942, p. 1.
- 18 GERMANY—RUMANIA. Signed trade agreement. *B. I. N.*, June 27, 1942, p. 581.
- 19 CUBA—UNITED STATES. Announced signature at Havana of agreement whereby Cuba offers facilities to United States War Department for training aviation personnel and for operations against enemy undersea craft, the facilities to revert to Cuba at the end of the emergency period. *D. S. B.*, June 20, 1942, p. 553; *N. Y. Times*, June 20, 1942, p. 6.
- 21 PETER II. King of Yugoslavia arrived in Washington. *N. Y. Times*, June 22, 1942, p. 1.
- 22/27 GREAT BRITAIN—UNITED STATES. Texts of joint statements of President Roosevelt and Prime Minister Churchill regarding collaboration in the war effort: *London Times*, June 23, 1942, p. 4; *N. Y. Times*, June 28, 1942, p. 2; *D. S. B.*, June 27, 1942, pp. 561-562.
- 24 ARGENTINA. Resignation was announced of Dr. Roberto M. Ortiz as President. *C. S. Monitor*, June 24, 1942, p. 7.
- 24 FRANCE (Free). Announcement made that Gen. de Gaulle had issued a declaration, calling for restoration of the country and empire, and providing for a postwar election of a national assembly to determine their own future. Text: *N. Y. Times*, June 25, 1942, p. 10; *C. S. Monitor*, June 25, 1942, p. 7. Excerpts: *London Times*, June 24, 1942, p. 3.
- 25 AFGHANISTAN—UNITED STATES. Opened diplomatic relations. *B. I. N.*, July 11, 1942, p. 622.
- 25 CHINA—IRAN. Established diplomatic relations. *B. I. N.*, July 11, 1942, p. 622.
- 25 CZECHOSLOVAKIA (in exile)—IRAN. Czech Legation opened in Teheran. *B. I. N.*, July 11, 1942, p. 635; *London Times*, June 26, 1942, p. 3.

- 26 COLOMBIA—GERMANY. Colombia announced protest against sinking of schooner *Resolute*. *N. Y. Times*, June 27, 1942, p. 4.
- 26 JAPAN—SOVIET RUSSIA. Soviet Government charged Japan with sinking of the merchant vessel *Angarstroi* on May 1, previously ascribed to the United States by the Japanese press. *N. Y. Times*, June 26, 1942, p. 1.
- 26 MARITIME CONFERENCE. A joint maritime commission of the International Labor Office opened meeting in London. *N. Y. Times*, June 27, 1942, p. 5.
- 27 WHEAT AGREEMENT MEMORANDUM. Came into force for Argentina, Australia, Canada, United States and United Kingdom. It was initialed on April 22, 1942, at Washington. Texts of memorandum and draft convention: *N. Y. Times*, July 2, 1942, p. 12; *D. S. B.*, July 4, 1942, pp. 582-593. Text of agreement: *Cmd.* 6371; *London Times*, July 3, 1942, p. 2.
- 30-July 10 INTER-AMERICAN CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL. Meeting in Washington, the 21 American Republics agreed to bar export or import of dollars, save to the United States. *N. Y. Times*, July 16, 1942, p. 7. Proceedings and Final Act: *P. A. U. Congress and Conference Ser.* Nos. 39 and 40.

July, 1942

- 1 MEXICAN OIL. Mexican Supreme Court ordered return of two large properties to the Standard Oil Company of New Jersey, expropriated in 1938. *N. Y. Times*, July 2, 1942, p. 6. Question of oil expropriation may be reopened as result of the order. *London Times*, July 3, 1942, p. 4.
- 1 POLAND (in exile)—UNITED STATES. Signed mutual aid agreement at Washington. Text: *D. S. B.*, July 4, 1942, p. 577.
- 6 BRAZIL—UNITED STATES. Signed agreement at Washington extending to July 15, 1947, the stabilization agreement of July 15, 1937. Text: *D. S. B.*, July 11, 1942, pp. 622-623.
- 6 CUBA—UNITED STATES. Signed financial agreement. *D. S. B.*, July 11, 1942, p. 623.
- 6-16 INTER-AMERICAN CONFERENCE ON AGRICULTURE. 2d conference met at Mexico City. *D. S. B.*, June 27, 1942, p. 568. Adopted 76 resolutions. *N. Y. Times*, July 17, 1942, p. 5.
- 8 NETHERLANDS (in exile)—UNITED STATES. Signed lend-lease agreement at Washington. *N. Y. Times*, July 9, 1942, p. 7. Text: *D. S. B.*, July 11, 1942, pp. 604-606.
- 9 FRANCE (Free)—UNITED STATES. United States announced intention to assist Gen. de Gaulle militarily. Admiral Stark and Brig. Gen. Boite were appointed to consult with French National Committee in London. Text of memo: *N. Y. Times*, July 10, 1942, p. 6; *D. S. B.*, July 11, 1942, pp. 613-614.
- 9 MAYOTTA. Announcement was made of seizure of the French island by British forces. It lies in the Mozambique Channel. *N. Y. Times*, July 10, 1942, p. 1.
- 10 GREECE (in exile)—UNITED STATES. Signed lend-lease agreement at Washington. *N. Y. Times*, July 11, 1942, p. 5. Text: *D. S. B.*, July 11, 1942, pp. 601-603.
- 10 NETHERLANDS (in exile)—SOVIET RUSSIA. Signed accord in London, renewing diplomatic relations. *N. Y. Times*, July 11, 1942, p. 4; *B. I. N.*, July 25, 1942, p. 676. Text: *Netherlands News* (N. Y.), June 26/July 10, 1942, p. 16; *Inter-Allied Review* (N. Y.), July 15, 1942, p. 169.

- 11 CZECHOSLOVAKIA (in exile)—UNITED STATES. Signed lend-lease agreement. *N. Y. Times*, July 12, 1942, p. 26. Text: *D. S. B.*, July 11, 1942, pp. 607-609.
- 11 NORWAY (in exile)—UNITED STATES. Signed lend-lease agreement at Washington. *N. Y. Times*, July 12, 1942, p. 26. Text: *D. S. B.*, July 11, 1942, pp. 609-611.
- 12 FRANCE (Vichy)—JAPAN—THAILAND. Vichy Government confirmed cession of territory in French Indo-China to Thailand. *N. Y. Times*, July 13, 1942, p. 8.
- 13 FRANCE (Vichy)—UNITED STATES. Vichy rejected United States proposal that it move interned French warships from Alexandria, Egypt, to Martinique. *C. S. Monitor*, July 18, 1942, pp. 1, 4; *N. Y. Times*, July 17, 1942, pp. 1, 5. Résumé: *B. I. N.*, July 25, 1942, p. 669.
- 14 CANADA—UNITED STATES. President Roosevelt approved and proclaimed amendatory regulations of the Migratory Birds Convention, signed by United States and Great Britain in respect of Canada on Aug. 16, 1916. *D. S. B.*, Aug. 1, 1942, p. 678.
- 14 FRANCE (Free). Name changed from Free France to Fighting France (*La France Combattante*), beginning July 14. *N. Y. Times*, July 14, 1942, p. 1; *London Times*, July 14, 1942, p. 4.
- 14 MEXICO—UNITED STATES. President Roosevelt approved and proclaimed amendatory regulations of the Migratory Birds Convention, signed Feb. 7, 1936. *D. S. B.*, Aug. 1, 1942, p. 678.
- 15 JAPAN—SOVIET RUSSIA. Japanese Foreign Ministry announced Russia had assured Japan that the new Anglo-Soviet treaty and the new agreement between Russia and the United States contain no provision regarding Japan. *C. S. Monitor*, July 15, 1942, p. 1.
- 15 NICARAGUA—UNITED STATES. Signed commercial agreement at Mexico City. *N. Y. Times*, July 16, 1942, p. 9.
- 15/16 BOLIVIA—UNITED STATES. Effected sanitation agreement by exchange of notes. *D. S. B.*, Aug. 15, 1942, pp. 703-704.
- 16 FINLAND—UNITED STATES. United States notified Finland that consular representation was cancelled as of Aug. 1, 1942, due to Finnish refusal to abide by the consular agreement of 1934. *N. Y. Times*, July 17, 1942, p. 1; *D. S. B.*, July 18, 1942, p. 632.
- 16 FRANCE (Vichy)—UNITED STATES. Vichy protested assignment of United States military representatives to Gen. de Gaulle. *C. S. Monitor*, July 18, 1942, p. 1; *London Times*, July 17, 1942, p. 3.
- 17 CUBA—SPAIN. Cuba cancelled Spanish Embassy's and Consulates' privileges to use ciphers or codes in despatches. *N. Y. Times*, July 18, 1942, p. 3; *B. I. N.*, July 25, 1942, p. 667.
- 17 SPAIN. General Franco proclaimed a law for the creation of the Spanish Cortes. *B. I. N.*, July 25, 1942, p. 678.
- 18 FRENCH INDO-CHINA—JAPAN. Japan announced signature of economic agreement at Saigon. *N. Y. Times*, July 19, 1942, p. 15.
- 20 NORWAY (in exile). Official bulletin announced abandonment of a pre-war project for a Nordic defensive bloc, and based hope for future security on attachment to the United States, Great Britain and their allies. Excerpts: *N. Y. Times*, July 21, 1942, p. 5.

- 21 UNITED STATES—URUGUAY. Signed trade agreement. Analysis of provisions: *D. S. B.*, July 25, 1942, p. 653; *N. Y. Times*, July 22, 1942, p. 3. Analysis, concessions and tables: *D. S. B.*, July 25, 1942, Supplement.
- 22 BULGARIA—SWEDEN. Announced signature of trade agreement. *C. S. Monitor*, July 23, 1942, p. 5.
- 24 FRANCE (Vichy)—ITALY. Announcement was made of signature of an agreement for industrial and agricultural development of North Africa and general collaboration. *C. S. Monitor*, July 24, 1942, p. 2; *London Times*, July 23, 1942, p. 3.
- 24 UNITED STATES—YUGOSLAVIA (in exile). Signed lend-lease agreement. Text: *D. S. B.*, July 25, 1942, pp. 647-649. Pledged war unity in joint statement. Text: *N. Y. Times*, July 25, 1942, p. 5.
- 28 INTER-AMERICAN HIGHWAY. Announcement was made that arrangements had been concluded with Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama for the construction of a pioneer road to be replaced later by the contemplated permanent highway. *D. S. B.*, Aug. 1, 1942, p. 661.
- 29 FRANCE (Vichy)—SPAIN. Signed financial agreement at Madrid. *London Times*, July 30, 1942, p. 3.
- 29/August 4 GREAT BRITAIN—UNITED STATES. House of Lords and House of Commons passed the United States of America (Visiting Forces) Bill, granting jurisdiction to United States military courts over all military or naval forces of the United States. *London Times*, July 30 and Aug. 5, 1942, pp. 8 and 2. Text: 5 & 6. Geo. 6. Ch. 31.
- 30 MEXICO—UNITED STATES. Signed 8-year agreement in Mexico City, providing for an increase in Mexico's rubber production on a permanent large-scale basis. *C. S. Monitor*, July 30, 1942, p. 1.
- 31 BRAZIL—UNITED STATES. Signed six economic agreements. Three other agreements are under consideration. *N. Y. Times*, Aug. 2, 1942, p. 14.
- 31 SABOTEURS (German). Text of Supreme Court decision: *N. Y. Times*, Aug. 1, 1942, p. 3.
- 31/August 1 SOVIET RUSSIA—UNITED STATES. Exchanged identical notes renewing their commercial agreement which became effective on Aug. 6, 1937, and renewed annually thereafter. Text of notes and of 1937 agreement: *D. S. B.*, Aug. 1, 1942, pp. 662-664.

August, 1942

- 3-5 WHEAT COUNCIL. The Council met August 3-5. *D. S. B.*, Aug. 8, 1942, pp. 688-689. United States delegates: *D. S. B.*, Aug. 1, 1942, p. 670. Next meeting will be held January, 1943.
- 5 CZECHOSLOVAKIA (in exile)—GREAT BRITAIN. Great Britain issued White Paper containing exchange of notes concerning Great Britain's repudiation of the Munich Pact of 1938 by which the Sudetenland was ceded to Germany. *N. Y. Times*, Aug. 6, 1942, p. 1; *C. S. Monitor*, Aug. 5, 1942, p. 4.
- 5 INDIA. Working Committee of the All India Congress Party approved a resolution promising to become an ally of the United Nations in return for freedom. *N. Y. Times*, Aug. 6, 1942, pp. 1, 3. Text of Cripps' statement: p. 3. Text of Gandhi resolution: *N. Y. Times*, July 18, 1942, p. 3; *London Times*, Aug. 5, 1942, p. 3.
- 5 WILHELMINA, QUEEN. Arrived in Washington. *N. Y. Times*, Aug. 6, 1942, p. 1.

- 12 MEXICO—UNITED STATES. Signed consular convention at Mexico City. *D. S. B.*, Aug. 15, 1942, p. 704; *N. Y. Times*, Aug. 13, 1942, p. 3.
- 13 ARGENTINA—PARAGUAY. President Castillo of Argentina signed bill renouncing Argentina's claim to part of the 10-billion peso indemnity imposed on Paraguay by Argentina, Brazil and Uruguay as part of the 1867 peace treaty. *N. Y. Times*, Aug. 15, 1942, p. 3.
- 13 PANAMA—UNITED STATES. President Roosevelt sent message to Congress recommending certain concessions with regard to sanitary provisions in the Canal Zone. Text: *D. S. B.*, Aug. 15, 1942, p. 699.

INTERNATIONAL CONVENTIONS

EUROPEAN COLONIES AND POSSESSIONS IN THE AMERICAS. Havana, July 30, 1940. *
Text: *U. S. T. S.*, No. 977.

HOLIDAYS WITH PAY (Seamen). Geneva, Oct. 24, 1936.
Ratification: Mexico. June 12, 1942. *D. S. B.*, July 11, 1942, p. 624.

INTER-AMERICAN INDIAN INSTITUTE. Mexico City, Nov. 29, 1940.
Text: *U. S. T. S.*, No. 978.

LETTERS, ETC., OF DECLARED VALUE. Buenos Aires, May 23, 1939.
Adhesion: Croatia. April 7, 1942. *D. S. B.*, June 6, 1942, p. 528.
Application to: French Colonies. June 1, 1942. *D. S. B.*, Aug. 8, 1942, p. 693.

MONEY ORDERS. Buenos Aires, May 23, 1939.
Adhesion: Croatia. April 7, 1942. *D. S. B.*, June 6, 1942, p. 528.
Application to: French Colonies. June 1, 1942. *D. S. B.*, Aug. 8, 1942, p. 693.

NORTH AMERICAN REGIONAL BROADCASTING. Havana, Dec. 13, 1937.
Adhesion: Newfoundland. *D. S. B.*, June 27, 1942, p. 572.

OPIUM CONVENTION, 2d. The Hague, Jan. 23, 1912.
Adhesions:
Belgian Congo and Ruanda-Urundi. *D. S. B.*, Aug. 15, 1942, p. 705.
Egypt. *D. S. B.*, July 4, 1942, p. 597.

PARCEL POST. Buenos Aires, May 23, 1939.
Adhesion: Croatia. April 7, 1942. *D. S. B.*, June 6, 1942, p. 528.
Application to: French Colonies. June 1, 1942. *D. S. B.*, Aug. 8, 1942, p. 693.

POSTAL COLLECTION ACCOUNTS. Buenos Aires, May 23, 1939.
Application to: French Colonies. June 1, 1942. *D. S. B.*, Aug. 8, 1942, p. 693.

POSTAL SUBSCRIPTIONS TO NEWSPAPERS. Buenos Aires, May 23, 1939.
Application to: French Colonies. June 1, 1942. *D. S. B.*, Aug. 8, 1942, p. 693.

POSTAL TRANSFERS. Buenos Aires, May 23, 1939.
Application to: French Colonies. June 1, 1942. *D. S. B.*, Aug. 8, 1942, p. 693.

POWERS OF ATTORNEY. Protocol. Washington, Feb. 17, 1940.
Promulgation: United States. May 22, 1942. *D. S. B.*, May 30, 1942, p. 501.
In effect with respect to United States, Brazil, El Salvador (with reservation) and Venezuela (with modification).

PRISONERS OF WAR. Geneva, July 27, 1929.
Adhesion: Costa Rica. July 12, 1942. *D. S. B.*, July 25, 1942, p. 653.

RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Revision, Cairo, April 8, 1938.
Approval: Turkey. *D. S. B.*, June 13, 1942, p. 540.

STATISTICS OF WAGES AND HOURS OF WORK. Geneva, June 20, 1938.

Ratification: Mexico. *C. S. Monitor*, Aug. 1, 1942, p. 2.

SUGAR PRODUCTION AND MARKETING. Protocol. London, July 22, 1942.

Signatures:

United States, Australia, Belgium, Cuba, Czechoslovakia, Dominican Republic, Haiti, Netherlands, Peru, Philippine Islands, South Africa, Soviet Russia and United Kingdom.

Text of draft protocol to enforce and prolong after Aug. 31, 1942, the international agreement of May 6, 1937: *D. S. B.*, Aug. 1, 1942, pp. 678-680.

TELECOMMUNICATIONS CONVENTION. Madrid, Dec. 9, 1932.

Denunciation: Haiti. March 26, 1942. *D. S. B.*, July 25, 1942, p. 653.

TELEGRAPH REGULATIONS AND PROTOCOL. Cairo, April 4, 1938.

Approval: Turkey. *D. S. B.*, June 13, 1942, p. 540.

TELEPHONE REGULATIONS AND PROTOCOL. Cairo, April 4, 1938.

Approval: Turkey. *D. S. B.*, June 13, 1942, p. 540.

UNIVERSAL POSTAL CONVENTION. Buenos Aires, May 23, 1939.

Adhesion: Croatia. April 7, 1942. *D. S. B.*, June 6, 1942, p. 528.

Application to: French Colonies. June 1, 1942. *D. S. B.*, Aug. 8, 1942, p. 693.

DOROTHY R. DART

NEW YORK SUPREME COURT
(APPELLATE DIVISION, SECOND DEPARTMENT)

ULEN & COMPANY, Appellant, v. BANK GOSPODARSTWA KRAJOWEGO (National Economic Bank), Respondent ¹

December 23, 1940

Bringing a foreign government's claim of immunity from suit to the attention of the court as a matter of comity is not a recognition of the claim by the State Department, and the court is left free to determine the question of jurisdiction uninstructed by the executive branch of the government.

It is well recognized as a basic principle of general application that in the courts of this country both our own government and the governments of friendly foreign nations are immune from suit. The immunity of the domestic sovereign is based on the historic principle that no court has power to command the king. The immunity of the foreign sovereign is founded on an implied consent on the part of all sovereigns, as a matter of comity, to a relaxation of the complete jurisdiction which each naturally enjoys within his own territory.

A corporation organized by either a domestic or foreign government for commercial objects in which the government is interested, does not share the immunity of the sovereign.

To contend that the funds attached are the property of Poland, and that the bonds represent a part of the public debt of Poland, is merely saying in another way that the separate individuality of the defendant should be disregarded, and that the Bank and the Polish Government should be considered as one. Because we may not so consider them, we must reject the conclusion suggested. The funds attached are not those of the Polish Government, but of the defendant. The Bonds are not those of the Polish Government, for the defendant is the obligor.

CLOSE, J. The action is brought to recover the sum of \$219,888, due and unpaid on interest coupons attached to bonds issued by the defendant in the principal amount of \$7,519,000. The defendant (hereinafter called "the Bank") was created in the Republic of Poland in 1924. It claims to be an instrumentality of, and so closely identified with, the Polish Government as to be entitled to share the sovereign immunity from suit which would be accorded to that government itself. The defendant and the Polish Government both appeared specially in the action and moved to dismiss the complaint and to vacate a warrant of attachment, previously obtained by the plaintiff, for lack of jurisdiction. The Special Term granted the motion, but stayed all proceedings pending the determination of the plaintiff's appeal.

The complaint alleges that the defendant is a foreign corporation, organized under the laws of the Republic of Poland. The defendant denies that it is a corporation under Polish law and describes itself as a "State institution." The nature of the defendant, and its relationship to the government which created it, is to be determined primarily from what appears in its charter. It was chartered by means of a decree of the President of the Republic on May 30, 1924, pursuant to a statute relative to the reform of the currency. Article I of the charter provided for the merger of three existing institutions, the Polish National Bank, the State Reconstruction Bank, and the Credit

¹ Law Report News, December 27, 1940, p. 3.

Institution of Galician Cities, into a single bank to be known as "Bank Gospodarstwa Krajowego" (National Economic Bank). The new bank was described as follows in Article 3:

The Bank Gospodarstwa Krajowego is a State institution; it is a distinct legal person possessing the right of autonomous legal representation and has the right to use in its seal the coat of arms of the State. The corporate seat of the Bank is the City of Warsaw and the territory of its activity—all the Republic.

Under Article 4 the share capital of the Bank was to be fixed by the by-laws in the form of shares owned by the State Treasury, State enterprises, municipalities, and municipal enterprises; but not less than sixty percent of the shares were to be owned by the State Treasury and State enterprises. The objects of the Bank were stated, in Article 5, to be the granting of long-term credits through the issuance of bonds; the support of savings institutions; the reconstruction of devastated lands; and the conduct of all banking activities with particular consideration for the needs of the State, State enterprises and municipalities. Supreme control of the Bank was vested in the Minister of Finance, who was also authorized to promulgate the by-laws. A subsequent amendment to the charter provided for the allocation of net profits in the following manner: Not less than thirty-five percent for the establishment of special reserve funds for the Bank's debentures and bonds; not less than twenty percent for the establishment of a general reserve fund; not more than ten percent for other purposes provided for in the by-laws; and the remainder to be "put at the disposal of the State Treasury and of municipalities in proportion to their shareholdings." The Bank was declared exempt from certain specified State taxes.

Under the by-laws the Bank was authorized to establish branch offices in Poland and abroad. Express power was given to accept deposits, to grant loans, and to buy or sell bills of exchange, foreign currencies and securities. The Minister of Finance was authorized to appoint a government commissioner to supervise all the activities of the Bank.

In 1925 the defendant entered into a trust agreement in the city of New York, with The Chase National Bank as trustee, for the issuance of its bonds in the principal amount of \$10,214,000, to be secured by a mortgage on the general obligations of certain municipalities in Poland. The proceeds were to be used for the construction of public works in Polish cities. The loan was declared to be "a direct liability and obligation of the Bank, irrespective of any security provided hereunder, . . ." The Bank was the obligor named in the bonds. The agreement provided that in case of default the trustee might protect and enforce its rights and the rights of the bondholders by judicial proceedings in the Republic of Poland, or in the United States, or elsewhere. By a separate instrument the Republic of Poland guaranteed the payment of both principal and interest. Plaintiff is the owner of \$5,637,000 of this issue of bonds. In 1937 the maturity date was

extended from 1946 to 1967, and the interest rate was reduced from eight to three per cent. The Republic of Poland consented to the extension and renewed its guaranty.

In 1926 the defendant placed a second issue of bonds with the same trustee in the principal amount of \$2,750,000. The agreement was in all essential respects similar to the first. In 1937 there was a similar extension agreement and reduction of the interest rate. The Republic of Poland again guaranteed payment. Plaintiff holds \$1,882,000 of these bonds.

On January 3, 1940, with the defendant already in default in the payment of interest on both bond issues, the Polish Government published a notice to the effect that because of the German invasion the payment of interest and sinking fund on all Polish loans must be suspended for the duration of the war. Listed in the notice were thirteen bond issues, including the two involved here. The plaintiff immediately procured its warrant of attachment, served it on a number of New York banks in which the defendant had funds on deposit, and commenced this action.

Before proceeding to the main question presented by the appeal, it will be necessary to dispose of a preliminary point. After the commencement of the action the Polish Ambassador communicated in writing with the Secretary of State of the United States, calling attention to the pending action, asserting that the defendant claimed immunity from suit as an instrumentality of the Republic of Poland, and requesting that the Secretary advise the court of the position taken by the Polish Government. The Secretary of State thereupon requested the Attorney General to instruct the proper United States Attorney to appear before the court at the proper time and present the Polish Government's position "without argument or comment on his part other than to state that the statements of the Government of the Republic made in its behalf by the Polish Ambassador at Washington are brought to the attention of the court as a matter of comity between the United States and the Republic of Poland, a sovereign State duly recognized by the United States." The United States Attorney for the Eastern District of New York appeared before the court on the motion to dismiss and submitted a written statement complying literally with these instructions.

It is urged that the action of the State Department amounted to a recognition and allowance of the defendant's claim to immunity by the executive branch of the United States Government. If that were a correct interpretation the court would have been obliged, without further inquiry, to accept the claim of immunity and decline jurisdiction. (*Compañía Española v. Navemar*, 303 U. S. 68.)² It is quite plain, however, that the State Department did not undertake to recognize the claim as valid or to influence the action of the court. It took a position of courteous neutrality. This left the court free to determine the question of jurisdiction, uninstructed by the

² Printed in this JOURNAL, Vol. 32 (1938), p. 381.

executive branch of the government. (*Lamont v. Travelers Ins. Co.*,³ 281 N. Y., 362; *Hannes v. Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189.) The question is before us on the merits.

It is well recognized as a basic principle of general application that in the courts of this country both our own government and the governments of friendly foreign nations are immune from suit. The immunity of the domestic sovereign is based on the historic principle that no court has power to command the King. (*The Parlement Belge*, 5 P. D. [1880] 197.) The immunity of the foreign sovereign rests on a somewhat different theory. It is founded on an implied consent on the part of all sovereigns, as a matter of comity, to a relaxation of the complete jurisdiction which each naturally enjoys within his own territory. (*Schooner Exchange v. M'Faddon*, 11 U. S. 116, 136.) Theoretically, therefore, the immunity of the domestic sovereign is a matter of right, while that of the foreign sovereign is a matter of favor granted voluntarily by the domestic government. But since the favor is reciprocal, the one immunity is, in practice, as obligatory upon the judicial branch as the other. In determining how far the immunity extends beyond the immediate person of the sovereign, authorities dealing with the creatures of the domestic and of foreign governments would seem to be equally applicable.

Reference may first be made to cases involving instrumentalities created by our own government. An early and leading case is *Bank of The United States v. Planters' Bank of Georgia* (22 U. S. 904, 907). There the question was whether the defendant bank was subject to suit in the Federal courts, in view of the fact that one of its stockholders was the State of Georgia. It was held that "when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."

In *Sloan Shipyards v. U. S. Fleet Corp.* (258 U. S. 549, 566, 567), Congress had authorized the United States Shipping Board to form the Emergency Fleet Corporation and to purchase not less than a majority of its stock. Sweeping powers, particularly of eminent domain, were given to the corporation by Acts of Congress and executive order. The defendant claimed immunity from suit. The court held, however, that it was not entitled to immunity, even though it might be an instrumentality or agent of the government, and that "such a notion is a very dangerous departure from one of the first principles of our system of law"; the principle being that "any person within the jurisdiction always is amenable to the law."

*In *Keifer & Keifer v. R. F. C.* (306 U. S. 381, 388) the conclusion was the same. The question was whether Regional Agricultural Credit Corporations, formed under authority of Congress by the Reconstruction Finance Corporation, were entitled to governmental immunity. It was held that "the government does not become the conduit of its immunity in suits

³ Printed in this JOURNAL, Vol. 34 (1940), p. 349.

against its agents or instrumentalities merely because they do its work"; and that such corporations would be subject to suit "even if the conventional to-sue-and-be-sued clause were omitted" from the statutes creating them.

The respondent relies on *U. S. Grain Corp. v. Phillips* (261 U. S. 106). But no question of immunity was involved in that case. Plaintiff, a United States naval officer, sued for a percentage of a cargo of gold transported in his ship for delivery to the defendant. Under Federal law the commanding officer of a naval vessel was entitled to such compensation for the transportation of gold, unless the owner was the United States Government, in which case the officer was required to carry the cargo without charge as a part of his official duties. The gold carried in the plaintiff's ship was the property of the United States Grain Corporation, an organization formed pursuant to presidential order, in which all the shares of stock were owned by the United States. It was held that although legal title to the gold was in the corporation, the government was the actual owner and the plaintiff was not entitled to compensation. The opinion indicates that the case was one in which the court found it necessary to disregard the corporate form in order to prevent unjust enrichment of the plaintiff at public expense. It was not suggested that the corporate identity of the defendant would have been ignored under other circumstances. On the contrary, the Sloan Shipyards Corporation case (*supra*) was cited to show that the separate existence of the corporation otherwise would have been recognized. "But for purposes like the present," said the court (p. 113), "Imponderables have weight." And the case having been decided on its own "imponderables," is not an authority for disregarding the distinct personality of the defendant under the very different circumstances of the present case.

There appears to be no decision in either the United States Supreme Court or in the New York Court of Appeals dealing with corporations formed by foreign governments. There are several such cases, however, in the lower Federal courts in which the same conclusion has been reached as in the case of domestic governmental corporations. In *Coale v. Société Co-op. Suisse des Charbons, Basle* (21 F. [2d] 180) the defendant was a corporation formed by the Swiss Government for the importation of coal. The charter and by-laws were subject to governmental approval. The government appointed seven of the seventeen directors, and was entitled to all the net profit above six percent. The plaintiff sued on a contract of sale which had been signed in the defendant's behalf by the Swiss Minister. The defendant claimed immunity. The District Court held that the defendant was not immune from suit and was liable on the contract. A similar conclusion was reached in *United States v. Deutsches Kalisyndikat Gesellschaft* (31 F. [2d] 199) in the case of a corporation formed and controlled by the French Government for the purpose of exploiting potash mines in Alsace. It was held that a "suit against a corporation is not a suit against a government merely

because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government" (p. 202).

We approve the principle of these latter cases and conclude that a corporation organized by either a domestic or foreign government for commercial objects in which the government is interested, does not share the immunity of the sovereign. There is a dispute in the present case as to whether the defendant is a corporation, but it is of no actual importance whether it be called by that name or not. It has all the characteristics of a corporation. For present purposes the most significant fact is that the Bank is described in its own charter as "a distinct legal person." Since it is a person quite distinct from the Polish Government, the reasoning employed in the foregoing authorities with respect to corporations applies with equal force to the defendant. This characteristic also distinguishes the present case from certain authorities cited by the defendant. Thus in *Oliver American T. Co. v. Government of the U. S. of Mexico* (5 F. [2d] 659), where the plaintiff sued on a contract made with the "National Railways of Mexico" it appeared that there was no corporation or legal person existent under that name. "National Railways of Mexico" was merely a name for a system of railroads directly owned and controlled by the Mexican Government. Accordingly it was held that the foreign government was entitled to prevail in its claim to sovereign immunity. The same feature was present in *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen* (43 F. [2d] 705), which involved the Swedish State Railways; ⁴ and in *Mason v. Intercolonial Railway* (197 Mass. 349), where the railroad was owned directly by the King of England.

The defendant contends that the funds attached by the plaintiff are the property of Poland, and that the bonds represent a part of the public debt of Poland. If either proposition were true, the defendant would be immune from suit. (*Lamont v. Travelers Ins. Co.*, *supra*.) But this is merely saying in another way that the separate individuality of the defendant should be disregarded, and that the Bank and the Polish Government should be considered as one. Because we may not so consider them, we must reject the conclusion suggested. The funds attached are not those of the Polish Government, but of the defendant. The bonds are not those of the Polish Government, for the defendant is the obligor. There could be no clearer illustration of the separate identity of the Bank and the Government than the fact that the Government guaranteed the Bank's obligations.

Having concluded that the defendant is not immune from suit, we do not reach the question of whether immunity was or could be waived by the provisions of the trust agreements.

The order, in so far as appealed from, should be reversed on the law, with ten dollars costs and disbursements, and the motion denied, with ten dollars

⁴ For this case on appeal to the United States Supreme Court, see this JOURNAL, Vol. 25 (1931), p. 360.

costs, with leave to defendant to answer within twenty days from the entry of the order hereon.

LAZANSKY, P. J., HAGARTY, CARSWELL and ADEL, JJ., concur.

Order, in so far as appealed from, reversed on the law, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, with leave to defendant to answer within twenty days from the entry of the order hereon.

NEW YORK COURT OF APPEALS

HAROLD ANDERSON, Appellant, *v.* N. V. TRANSANDINE HANDELMAAT-
CHAPPIJ, *et. al.*, Respondents (THE STATE OF THE NETHERLANDS,
Intervener-Respondent) ¹

Decided July 29, 1942

Decree of the Royal Netherlands Government temporarily resident in London recognized by the United States as the Government of the Kingdom of The Netherlands, vesting in the State of The Netherlands title to property and funds outside of the realm in Europe belonging to persons domiciled in The Netherlands is part of the law of a friendly sovereign State. By the comity of nations, rights based upon the law of a foreign State to intangible property which has a situs in this State are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State.

The decree here challenged does not violate the rule that confiscatory decrees of foreign countries offend the fundamental rule upon which our economic and social system rests, that no person may be deprived of his property without due process of law and upon payment of fair compensation. The decree is in part designed to prevent such property from falling into the hands of the foreign enemy who invaded The Netherlands. That enemy is now our enemy. A decree designed for such purposes and having such effect may hardly be said to offend a public policy of this State. The decree of the Government of The Netherlands is valid and bars a levy upon the property.

The question whether the courts must give effect to the mere *formulation* of a public policy by the State Department in respect to the effect of a decree of a foreign State relating to property within a State, regardless of whether such decree offends the public policy of the State, might involve very serious consequences in other cases. It can have no consequence where, as here, the public policy so formulated accords with the public policy of the State. For that reason we do not now consider or decide the question.

LEHMAN, Ch. J. The plaintiff in its complaint alleges that he is the assignee of Martin Tietz; that on or about April 26, 1940, April 30, 1940, and May 9, 1940, the corporate defendant at the instigation and with the assistance of the individual defendants converted securities and moneys owned by Tietz and which Tietz had delivered to the corporate defendant. The complaint demands judgment for the sum of \$48,394.38 as damages for the alleged conversion.

The plaintiff is a resident of this State; the defendants are residents of Amsterdam, in The Netherlands, and subjects of the State of The Netherlands. The cause of action arose outside of the State, and plaintiff's assignor is a non-resident alien. On July 25, 1940, the plaintiff obtained a warrant of attachment against the property of the defendants. The sheriff served

¹ Law Report News, July 31, 1942, p. 3.

the warrant upon persons or corporations in this State holding, for safekeeping, corporate stocks and bonds, which it is claimed belong to the defendants or some of them. By such service the sheriff has attempted to levy upon such property and upon deposits of funds in ordinary banking, checking or brokerage accounts in the name or names of the defendants. Thereafter the plaintiff obtained an order directing service of the summons herein by publication pursuant to the provisions of Section 232 of the Civil Practice Act.

The defendants named in the summons and complaint appeared specially, and upon an order to show cause moved to vacate and set aside the warrant of attachment and any levies made thereunder, and to vacate and set aside the attempted service upon the defendants by publication. In affidavits filed in support of their motion, the defendant challenged on several grounds the validity of the warrant of attachment. They also challenged the attempted levies under that warrant on the ground that by a decree of the lawful government of the State of The Netherlands promulgated on May 24, 1940, title to the property and funds which the sheriff has sought to attach is "vested in the State of The Netherlands as represented by the Royal Netherlands Government temporarily resident in London."

While the motion to dismiss made by the defendants was pending, the court made an order permitting the State of The Netherlands "to appear specially by a motion to vacate the attachment heretofore issued herein and the levies under said attachment." The State of The Netherlands asserts that it holds title to the property of the defendants in this State. The decree promulgated on May 24, 1940, provides in Article I that:

1) Title to claims against persons, partnerships, corporations, firms, institutions and public bodies which claims belong to natural or legal persons domiciled in the Kingdom of The Netherlands, . . . in so far as these claims are in any form whatsoever capable of being encumbered, pledged, transferred or the like, outside of the Realm of Europe, is hereby vested in the State of The Netherlands, as represented by the Royal Netherlands Government, temporarily resident in London and exercising its functions there . . .

2) . . .

3) The proprietary rights vested in the State of The Netherlands, by virtue of the provisions of the preceding paragraphs, shall only be exercised for the conservation of the rights of the former owners.

The State Department certified that:

- The Government of the United States continues to recognize as the Government of the Kingdom of The Netherlands the Royal Netherlands Government which is temporarily residing and exercising its functions in London.

The question presented upon the motion of that Government to vacate the attempted levy upon property to which that Government claims title under

the decree which it has promulgated, concerns solely the construction and effect of the decree.

At Special Term Mr. Justice Shientag, in a scholarly opinion, sustained the claim of the Royal Netherlands Government, and the Appellate Division has unanimously affirmed the order granting the motion to vacate. The Appellate Division granted leave to appeal, certifying the following question:

Did the Netherlands Royal decree of May 24th operate to bar the levy of an attachment by the plaintiff subsequent to the enactment of said decree as property in this State belonging to the defendants when said decree was enacted and the title to which was declared by said decree to be thereby vested in the State of The Netherlands?

The answer to that question is decisive of the validity of the *levy* upon the property to which the State of The Netherlands claims title; it is not entirely clear that the answer will determine whether the warrant of attachment is also invalid and should have been vacated. No such distinction was, however, urged by the plaintiff in the courts below, and it is not urged by the plaintiff upon this appeal. For that reason we could not consider any such question upon this appeal even if the scope of review of the order were not limited by the form of the certified question. If the order of the courts below is too broad, relief must be sought by a motion in the courts below to resettle it.

The certification by the State Department that the Government of the United States has recognized the Royal Netherlands Government in England as the Government of the State of The Netherlands constitutes a determination of *political* questions concerning the legitimacy of that government and its decrees. (*Guaranty Trust Co. v. United States*, 304 U. S. 126.)² The scope and the effect within this State of a decree promulgated by the recognized government are judicial questions, just as the scope and effect of the law of any long-established and recognized friendly foreign government, like England, would be judicial questions. The certification was not intended to withdraw from the court jurisdiction or right to determine those questions, as it would decide other judicial questions, without advice or suggestion from the political branch of the government.

While the appeal from the order of the Appellate Division was pending in this court the Department of State sent to the court a letter stating:

Since the entry of the United States into the present war and the signing of the Declaration of the United Nations, the Department has undertaken to formulate the policy of the United States with reference to the effectiveness of the said decree of May 24, 1940. In view of the formulation of policy which has now been made, the Department of State intends to ask the Attorney General to make formal representation to your court, setting forth that policy.

Accordingly, the United States Attorney for the Southern District of New

² Printed in this JOURNAL, Vol. 32 (1938), p. 848.

York applied at the direction of the Attorney General of the United States to this court for leave to appear and file "a Suggestion of Interest of the United States in the Matter in Litigation," bringing to the attention of the court the formulation by the State Department of its policy in respect to the effect to be given to the decree of the foreign State. Upon that application the United States Attorney stated that "in the interest of orderly procedure" the matter is being presented by motion for leave to file the suggestion, though he questioned whether leave of the court is necessary. Without considering or deciding whether leave is necessary, the court granted leave.

The suggestion filed by the United States Attorney states:

I. The United States has an interest and concern in the subject matter and outcome of this action in so far as there is involved the question of the effect on assets within the United States of the decree of May 24, 1940, of the Royal Netherlands Government, purporting to affect title to certain assets of nationals of The Netherlands. That interest arises from certain policies of the Government of the United States in the conduct of its international relations, which policies have been determined by the executive branch of the Government of the United States and should be given effect.

II. The Attorney General of the United States has received from the Honorable Cordell Hull, Secretary of State of the United States, a communication dated February 10, 1942, a certified copy of which is hereto annexed, wherein the Secretary of State requests that there be brought to the attention of this court the position of the Department of State relating to the effect of the decree of May 24, 1940, of the Royal Netherlands Government. The Attorney General has directed the undersigned to bring said communication to the attention of this court, as the Secretary of State has requested.

III. As appears from said communication, at the time of the adoption of the decree of May 24, 1940, the Royal Netherlands Government was recognized by the Government of the United States, and the Government of the United States has consistently taken cognizance of that decree as an act of the Royal Netherlands Government; and an expression of that cognizance was embodied in a letter to the Secretary of the Treasury under date of June 27, 1940, an authenticated copy of which is appended to the communication of the Secretary of State. However, as the Secretary points out, prior to the entry of the United States into the present war and to the signing of the Declaration of the United Nations, the Government of the United States did not adopt any policy with reference to the effect which should be given to that decree on assets within the United States; and pending the adoption of such a policy by the Government of the United States, the Department of State considered that the effect, if any, of that decree on assets within the United States was a matter to be determined by the courts of competent jurisdiction.

IV. It appears from the opinion of the Supreme Court of the State of New York herein (28 N. Y. Supp. [2d] 547, at pp. 553, 558) that that court gave to the expression of cognizance of June 27, 1940, a construction broader than was intended, apparently finding in it a determination by the executive branch of the Government relative to public

policy (*ibid.*, p. 553) and holding that the decree, "implemented by the recognition given to it by our national government, is self-executing" (*ibid.*, p. 558). On the contrary, as set forth in the Secretary's communication annexed hereto, the recognition was merely of the Royal Netherlands Government, and of the decree as an act of that Government without the adoption at that time of any policy with reference to the effect which should be given to that decree on assets within the United States, leaving that question, pending the adoption of such a policy, for judicial determination.

V. The Secretary points out, however, that since the entry of the United States into the present war and the signing of the Declaration of the United Nations, the Government of the United States has adopted a policy with reference to the particular question presented by this case. That policy, as announced by the Secretary, is as follows:

"It is the policy of the United States that effect shall be given within the territory of the United States to that decree in so far as it is intended to prevent any person from securing an interest in, or control over, assets of nationals of The Netherlands located in the United States on account of claims arising outside of the United States in territory now or at any time under the jurisdiction of The Netherlands Government, for the benefit of persons who are not at the time of their assertion citizens or residents of the United States."

VI. The foregoing statement of policy is made with express reservation by the Secretary of State, as follows:

"This statement reserves for further determinations of policy, in the light of further consideration and developments, all questions relating to the effectiveness of the decree as applied to other circumstances or persons and relating to the bearing of control which the Government of the United States may undertake through its executive and legislative branches to exercise over any assets purported to be affected by the terms of that decree."

VII. The Secretary of State, as shown by said communication, finds that the result of the decision of the Supreme Court of the State of New York, as affirmed by the Appellate Division, is in harmony with and will promote the policy of the United States, but the Secretary expressly refrains from expressing any views as to the compatibility with that policy of all the reasons stated in the opinion of the Supreme Court of the State of New York. The Secretary points out that it would be highly desirable that this court, in deciding the present case, confine itself to giving effect to the announced policy of the United States stated in that communication without expressing any view with respect to the effectiveness of the decree as applied to persons and circumstances other than those referred to in the statement of policy set forth in that communication.

VIII. It is submitted that the policy announced by the Department of State, if given effect, is dispositive of the controlling issues herein. As appears from the opinion of the Supreme Court of the State of New York (28 N. Y. Supp. [2d] 547, 550), the plaintiff, although a resident of the State of New York, is what is commonly known as an assignee for collection, the alleged assignment to him having been made solely for the purpose of making him, instead of his assignor, the plaintiff in the action, and that the plaintiff's assignor is a non-resident alien, a citizen of a country in Europe said to be Liechtenstein, and is now

understood to be resident in Cuba. It further appears from said opinion that the plaintiff's alleged cause of action arose outside of the United States in territory under the jurisdiction of The Netherlands Government.

IX. The Secretary's communication points out that while no view is expressed as to the compatibility with the policy of the United States of all the reasons stated in the opinion of the Supreme Court of the State of New York, should occasion arise wherein it is desirable to announce a policy of the United States bearing on those reasons, the Department of State will be pleased to undertake such a statement, but that the present case presents no such occasion. Should, contrary to this submission, the court hold that the policy announced by the Secretary of State is not full enough to dispose of the controlling issue herein presented and that the questions reserved by the Secretary of State need be determined in order to dispose of this case, it is respectfully requested that an opportunity be afforded the Secretary of State to announce the policy, if any, of the United States, bearing on those questions, prior to the disposition of this cause.

There can be no doubt that the decree of May 24, 1940, promulgated by the recognized government of the State of The Netherlands is part of the law of a friendly sovereign State of which the defendants are subjects and in which the defendants are domiciled, and that under such law title to the property described therein belonging to the nationals and residents of the State of The Netherlands (including the property upon which the sheriff has attempted to levy) vested in the State of The Netherlands. By comity of nations rights based upon the law of a foreign State to intangible property which has a situs in this State are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State. That rule is part of the law of this State, as it is, in general, the law of all countries which accept the reign of law. The question which the courts below were called upon to decide is whether the sequestration by the Government of the State of The Netherlands of property here belonging to its own nationals offends our public policy.

Argument may be made that confiscatory decrees of foreign countries offend the fundamental rule upon which our economic and social system rests, that no person may be deprived of his property without due process of law and upon payment of fair compensation. Here the challenged decree does not in purpose or effect violate that rule. Under its terms, the State becomes in effect a trustee for its subjects of their property which might otherwise be without protection and perhaps subject to seizure by a ruthless enemy. By Article V of the decree it is provided that: "Three months after the present emergency conditions shall in our judgment have ceased to exist, restitution shall be made of the claims mentioned in Article I to the former owners." The "emergency conditions" were created by the invasion of The Netherlands by a foreign enemy of The Netherlands. The decree is in part designed to prevent such property from falling into the hands of the enemy

for use in prosecuting the war. That enemy is now our enemy. A decree designed for such purposes and having such effect may hardly be said to offend a public policy of this State.

The plaintiff does not, indeed, claim seriously that it offends the public policy of the State, except to the extent that it excludes a resident creditor of a foreign debtor from resort to property of the creditor within the State for satisfaction of the debt. He seeks support for his contention in the decision of this case in *Barth v. Backus* (140 N. Y. 230). The limits of the application of the rules and principles there stated have been defined in *Martyne v. American Fire Ins. Co.* (210 N. Y. 183). The situation here presented does not fall within those limits. We agree with the courts below in their determination of the *judicial* question that the decree of the Government of The Netherlands is valid and bars a levy upon the property. The effect of that decree is not merely to "freeze" the property of the debtor. It divests the creditor of all title to the property.

We need not consider now whether the Department of State by "formulation" of its public policy as to the effect of the decree could change the judicial question determined by the court below into a "political question" which the courts are not empowered to decide or whether the Department of State can in that manner create a public policy of the United States which supersedes and renders immaterial any public policy of a State. Certainly the political departments of the United States Government may do so where enforcement of the public policy of a State might render ineffective a transfer of property within the State to the United States made in accordance with an agreement entered into by the United States, in the exercise of powers conferred by the Constitution of the United States with a recognized foreign government vested with title to the property by its own decree. (*United States v. Pink*, decided February 2, 1942, 86 Law Ed. 459.)^{*} The question whether the courts must give effect to the mere *formulation* of a public policy by the State Department in respect to the effect of a decree of a foreign State relating to property within a State, regardless of whether such decree offends the public policy of the State, might involve very serious consequences in other cases. It can have no consequence where, as here, the public policy so formulated accords with the public policy of the State. For that reason we do not now consider or decide the question.

The order should be affirmed, with costs and the question certified answered in the affirmative.

LOUGHRAN, FINCH, RIPPEY, LEWIS, CONWAY and DESMOND, JJ. concur.

Order affirmed.

^{*} Printed in this JOURNAL, Vol. 36 (1942), p. 309.

GREAT BRITAIN-PANAMA

HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN THE NAME OF AND REPRESENTING HIS MAJESTY'S GOVERNMENT IN THE IRISH FREE STATE v. THE GOVERNMENT OF THE REPUBLIC OF PANAMA

In the Matter of the Death of James Pugh

BEFORE JAMES J. LENIHAN, *Arbiter*

July 6, 1933

State responsibility for use of weapons by policemen.

The primary use of a policeman's club is to compel submission to lawful authority when physical effort is insufficient for such compulsion. It is at once a dangerous and a necessary instrument in his hands. A citizen who would violate the law and then add to it further violation by physically attacking the policeman who is lawfully and under his sworn obligation attempting to arrest him, has no complaint if he suffers physical violence by the hands of the police or by his club should the policeman's hands prove ineffective.

The policeman's responsibility is great and his position is delicate because he must not use his club when unnecessary and he must use it when necessary. Should he be remiss in either situation he is and should be culpable. It is impossible to set forth the situations which demand and justify the use of a club by a policeman, or to determine how he should use it. Conclusions can be arrived at only by a study of particular cases.

The record discloses in this case that the unfortunate and accidental death of Pugh was brought on by himself by reason of his resistance to arrest and the consequent lawful use of the policemen's clubs on him without any intent, actual or constructive, of killing him, but for the sole purpose of lawfully compelling his submission and of defending themselves. The policemen did not exceed the powers reasonably vested in them, and accordingly their actions were not malicious, voluntary and consequently culpable.

Claim dismissed.

A convention having been made and entered into, on October 15, 1932, between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland in the name of and representing His Majesty's Government in the Irish Free State, by His Majesty's Envoy Extraordinary and Minister Plenipotentiary to Panama, Sir Josiah Crosby, and The Government of The Republic of Panama, by the Secretary of Foreign Affairs of said Government, the Honorable J. Demostenes Arosemena, wherein and whereby it was agreed to submit to the decision of the undersigned, as Arbiter, the following questions, to wit:

(a) Did the Panamanian police agents Manuel de J. Tunon and Jose Cardoze exceed the powers reasonably vested in an agent of the public order in the exercise of his functions when, on Sunday, 30 June, 1929, they endeavored to take to the police station in the City of Colon the Irishman James Pugh who, it is affirmed, was in a state of intoxication, and as a result of such excess did the death of the said James Pugh occur?

(b) In the event that such excess did exist, and that by reason thereof the death of James Pugh occurred, is there certainty that the acts of the agents Manuel de J. Tunon and Jose Cardoze were malicious, voluntary, and consequently, culpable, and should the Panamanian Government, therefore, be considered obliged to pay to the British Government an indemnity for such death?

(c) If the Panamanian Government ought to pay to the British Government an indemnity, what should the indemnity amount to?

and

It being agreed, in Article 2 of said convention, that the submission of these questions to this arbitration "does not imply in any way whatsoever that the authority of the Panamanian courts, and, consequently, that of the tribunal of jurors which, on 25 October, 1929, in the Superior Court of the City of Panama, found the two police agents Manuel de J. Tunon and Jose Cardoze not guilty, is not recognized," and it being further agreed, in Article 3 of said convention, that the Arbiter should not, therefore, "enter upon appreciations of the verdict rendered by the tribunal of jurors, but shall in view of the events which took place in the City of Colon on Sunday the 30th of June, 1929, between the police agents Tunon and Cardoze and the Irishman James Pugh, and taking into consideration solely for the finding of the facts the proofs which with regard thereto are to be found in the record, decide *ex aequo et bono* on the questions" above set forth; and

Cyril Marriott, Esq. having been duly designated as special representative of His Majesty's Government in this arbitration and Dr. Gregorio Miro having been duly designated as such special representative of the Government of The Republic of Panama; both such designations and appointments being under authority of and in conformity with the provisions of Article 7 of said convention; and

It being agreed, in Article 9 of said convention, that the expenses of this arbitration should be taxed in our judgment and paid in equal parts by the respective Governments; and

It being further agreed, in Article 10 of said convention, that the parties will accept as final our decision within the terms of the convention without right to move for reconsideration or to appeal of any kind; and

The Government of the Republic of Panama having filed with us the "record" referred to in Article 3 of said convention, said record being that of the investigation, including the written testimony of witnesses, into the death of James Pugh and of the indictment and prosecution of the policemen Tunon and Cardoze in the courts of the Republic of Panama for the crime of homicide allegedly growing out of Pugh's death at their hands; and

The parties having filed with us their respective briefs within the times and provisions of Article 5 of said convention, the final brief having been filed on April 11, 1933; and

The case being now fully submitted and we having examined the record and briefs and being fully advised in the premises.

We now find the facts, set forth our conclusions and render our opinion as follows:

FINDINGS OF FACT

I. James Pugh of the Irish Free State was, on June 30, 1929, a seaman employed on the *S. S. Parismina*. On that date he was about 45 years of age,

about five feet eleven inches in height, and weighed about 190 pounds. He was apparently a man of strong build and in good physical condition. His skin was white, thick, and tough.

II. His ship was apparently in port at Cristobal, Canal Zone. Pugh went ashore and proceeded to Colon, Republic of Panama. Just when he came ashore, the record does not disclose, but, in any event he was in "Harry's Bar" in Colon at 7 a.m. on June 30, 1929. At that time he had been drinking and appeared to be slightly under the influence of liquor.

III. When one Luis Hernandez, an Indian of the San Blas country, and barkeeper at "Harry's Bar" began his work at 7 a.m., Pugh ordered a drink and had some more thereafter, for which drinks he paid. Afterwards he gambled with Hernandez for more drinks and won. He had been drinking regularly in "Harry's Bar" from 7 a.m. until about 10 a.m.

IV. At about 10 a.m. he seated himself at a table with a woman who had come into the place. He then ordered more drinks for himself and the woman. When he had had drinks served to the value of one dollar and twenty-five cents (\$1.25) he ordered more but Hernandez demanded payment of the one dollar and twenty-five cents (\$1.25) and refused to serve more drinks unless payment was made. Pugh became surly, refused to pay, and ordered Hernandez to serve more, stating that if Hernandez did not continue to serve, he, Pugh, would not pay what he already owed. Thereupon, Hernandez sent a fellow-countryman of his, who was in the place, for a policeman.

V. The countryman found Manuel de J. Tunon, Policeman No. 659 of the Panama National Police Force, on Avenida Herrera, Colon, and told the policeman of the trouble in "Harry's Bar." Tunon could not speak English, and, therefore, went in search of a comrade, who could. He found Jose Cardoze, Policeman No. 242 of the Panama National Police Force in front of No. 71 Eleventh Street, Colon. Cardoze could speak English. Tunon told Cardoze of the reported trouble in "Harry's Bar."

VI. Policemen of the National Police Force of Panama are uniformed and equipped with fire-arms and police clubs, as are the policemen of many of the nations of the world.

When inducted into the police force, they are required to take an oath of office, which, among other things, provides:

that in no case shall I make use of the arms which the Government placed in my hands, except to defend the law, the fatherland and justice; that I shall not employ them against individuals, except when, having exhausted all means of persuasion I have no other recourse than the means of force to defend my person, in case of attack, or the authority of the laws, or the execution of the orders given to me, or the prosecution of criminals and their submission to authority.

Both Tunon and Cardoze took and subscribed to such oaths.

VII. Both Tunon and Cardoze were smaller men than Pugh; neither was as strong as he; and neither was physically able to cope with him in physical combat.

VIII. Tunon and Cardoze proceeded to "Harry's Bar." When they arrived, they asked as to the trouble. When Hernandez stated that he had not paid the one dollar and twenty-five cents (\$1.25), Pugh protested that he had paid and attempted to strike Hernandez, whereupon Hernandez sought refuge behind the bar. Pugh then turned on the policemen and called them a vile name, telling them that he would not pay and telling them also to get out of the place. Cardoze then told Tunon to place Pugh under arrest and Cardoze then stepped out of the place.

IX. As above stated, Pugh had been drinking heavily for some hours and had reached an ugly and pugnacious mood. He was apparently determined not to submit willingly to arrest and was also apparently of the view that the police should not and could not arrest him.

X. Somehow Tunon succeeded in getting Pugh out of the bar without serious mishap to himself and he proceeded to take Pugh to the police station on foot. They proceeded along Bolivar Avenue and when they reached a point near the International Cabaret, Pugh physically resisted arrest and struck the policeman, knocking him down. Seeing this, Cardoze came to Tunon's aid and struck him with his club. Pugh continued to strike them and at them with his fists and the officers struck Pugh with their clubs on the arms, side, and head. Pugh's strength, condition and physical prowess were such that neither nor both of the policemen could subdue him nor protect themselves from his attacks by physical force alone and they were compelled to use their clubs upon him in order to subdue him and to defend themselves.

XI. As they passed the International Cabaret, Pugh was resisting arrest and striking and attempting to strike the policemen and at the same time attempting to ward off the blows of their clubs. At a point just past the alley which runs between the International Cabaret and the cantina of You Hing, Pugh fell backward from the sidewalk striking the fenders of an automobile and from there to the paved street. He struck the street full length on his back. From this position he did not rise but lay there unconscious, a condition from which he never rallied.

XII. Pugh was taken to the Charity Hospital in Colon where he died a short time after his arrival.

XIII. No blood was drawn on Pugh. He was examined by Dr. Rodolfe Peralta Ortega, Director of the Charity Hospital, who found no exterior marks of violence and who determined that death was due to cerebral hemorrhage. He was also examined slightly by Dr. Carlos Biebarach, Official Physician of the Police, who observed livid body marks in the right back and back region. He was also examined, through curiosity only, by Dr. E. W. Billick, physician and surgeon of Colon Hospital, who did not see external marks or blows on Pugh's head.

XIV. Generally when a blow is received with a bruising arm such as a policeman's club there is produced a blood tumor; other times it breaks the hairy skin.

XV. After Pugh's death, his body was taken from Charity Hospital to Colon Hospital. That afternoon, the body was delivered to Mr. C. H. Hewett of the United Fruit Company at Cristobal who, on the same day, shipped the body from Colon to the Board of Health Laboratory, Gorgas Hospital, Ancon, Canal Zone, where it arrived in the evening of the same day. Mr. Hewett requested that the body be embalmed and autopsied.

XVI. The body was embalmed on the morning of July 1st and was autopsied on the afternoon of the same day. The autopsy was performed by Dr. Raymond O. Dart, pathologist of Gorgas Hospital.

XVII. The autopsy showed, that prior to the time of the injuries sustained by him on June 30th, Pugh was evidently in excellent physical condition. Under the heading "External Examination" it is stated that "the dorsal surfaces of both shoulders, arms and hands are thickly sprinkled with large brown freckles. The skin elsewhere is white, but thick and tough" and that "this examination gave no indication of the severe contusions in the subcutaneous tissues."

Under the heading "Skull," it is stated that "the vault and the base of the skull show no evidence of fracture or traumatic injury. All bony cavities are clear."

Under the heading "Throat and Neck," it is stated that "the condition of the subcutaneous tissues found in this region are described elsewhere" and we find such description under the heading "Muscles and Subcutaneous Tissues" wherein it is stated that

wide flaps were dissected on the back from head to the sacral region. These revealed extensive contusions of the subcutaneous tissues. The largest of these is spread over an area on the right side of the back from the upper border of the shoulder to below the angle of the scapula and from the midline to the junction of the lateral and posterior surfaces of the chest wall. The subcutaneous tissues and the muscles in this region are dark red in color, hemorrhagic, and pulpified in the center. A similar large area of contused subcutaneous tissues and muscles occurs on the left posterior surface of the neck from the base of the skull to the upper surface of the left shoulder and from the middle of the lateral surface of the neck nearly to the spine. The tissues are similar in appearance to those of the back.

XVIII. The "Anatomical Diagnoses" are as follows:

- Dislocation, slight, 5th cervical vertebra.
- Rupture, complete, 5th intervertebral fibro-elastic cartilage.
- Rupture, partial, transverse, anterior longitudinal ligament, cervical region.
- Rupture, multiple, partial, ligamenta flava, cervical region.
- Hemorrhage, severe, subdural, spinal cord and base of brain.
- Hemorrhage, petechial, traumatic, spinal cord.
- Contusions, severe, hemorrhagic, multiple, scalp, neck and back.
- Contusions, scalp, right frontal region.
- Persistent thymus.

The "Cause of Death" is given as "Homicide by clubbing" and the "Contributory" element is stated to be "Dislocation of 5th cervical vertebra; severe subdural hemorrhage."

XIX. The "anatomical diagnoses" made by the pathologist, Dr. Dart, were the result solely of his autopsy of the body and his conclusions as to the cause of death and the contributory cause were based upon his diagnoses. He had no information as to the details of the altercation between Pugh and the police and states that Dr. Billick of the Colon Hospital had stated to him over the telephone that he, Dr. Billick, had "heard that the deceased had been involved in an altercation" with the police "in Colon about eleven in the morning" and that "no papers accompanied the body."

XX. James Pugh died from injuries to his back and neck and from a severe subdural hemorrhage, which injuries and hemorrhage were due to a clubbing received by him at the hands of policemen Tunon and Cardoze in Colon sometime between 10 and 11 a.m. on June 30, 1929.

XXI. Such injuries as James Pugh received from the clubbing by the police were so received by him while resisting lawful arrest and while he was engaged in administering physical punishment to the arresting officers.

James Pugh was so acting at the time as to compel the use of their clubs upon him by the police in order to subdue him, to protect themselves, to defend the authority of the laws of Panama, and to compel his submission to the lawful authority of the police power of Panama.

The police agents, Manuel de J. Tunon and Jose Cardoze did not exceed the powers reasonably vested in them, as such agents, in using their clubs on Pugh as hereinabove set forth. Their actions in so using their clubs were not malicious, but such actions were compelled by James Pugh himself. Their actions in so using their clubs were not voluntary, but were involuntary on their part; being caused by the actions of James Pugh himself.

XXII. Upon assuming his duties, the Arbiter directed that the briefs of the parties to be filed with him, under the provisions of Article 5 of the convention, should be so filed in both the English and Spanish languages and such briefs were so filed by the parties.

XXIII. Due to this direction of the Arbiter, His Majesty's Government has incurred expenses in the sum of forty-three dollars and seventy-five cents (\$43.75) as the cost of translating the original brief from the English into the Spanish languages and in the further sum of thirty-one dollars and fifty cents (\$31.50) as the cost of a similar translation of the reply brief. Claims for these sums have been filed with us.

It does not appear what, if any, expenses have been incurred by the Government of the Republic of Panama for translations from the Spanish into the English languages of the answering and counter-reply briefs filed with us by that Government and no claims have been filed with us for any such translations.

XXIV. Under Article 3 of the convention, it was agreed that the Arbiter

should take "into consideration solely for the finding of the facts the proofs which with regard thereto are to be found in the record." The "original record" is that of the investigation had by the Panamanian authorities into the death of Pugh and of the indictment and prosecution of policemen Tunon and Cardoze in the Panamanian courts for such death. This record is in Spanish.

Not being sufficiently familiar with the Spanish language to warrant our study of such record in that language, we found it necessary to have it, as well as the convention which was also in Spanish, translated into the English language. The greatest expense incurred by us was as to such translations.

The total expenses, including the cost of translations, stenographic costs, etc., is the sum of one hundred forty-five dollars and twenty cents (\$145.20).

JAMES J. LENIHAN

Arbiter

CONCLUSIONS

On the foregoing Findings of Facts, the Arbiter concludes:

1. That the Panamanian police agents Manuel de J. Tunon and Jose Cardoze did not exceed the powers reasonably vested in agents of the public order when they endeavored to take James Pugh to the police station in Colon, Republic of Panama, on June 30, 1929.

2. That the death of James Pugh did not occur as the result of any excess by police agents Manuel de J. Tunon and Jose Cardoze of powers reasonably vested in them as agents of the public order.

3. That the clubbing administered to Pugh by said police agents was so administered in defense of themselves and while compelling his submission to the lawful authority of the laws of Panama.

4. That the actions of said police agents in the use of their clubs on the person of Pugh were not malicious nor voluntary and were not, therefore, culpable.

5. That James Pugh came to his death, through his own fault, while attempting to resist lawful arrest and while engaged in unlawfully attacking police officers of Panama in the lawful discharge of their duties.

6. That this claim of His Majesty's Government against the Government of the Republic of Panama should be denied and dismissed.

7. That the claims of His Majesty's Government in the amounts of forty-three dollars and seventy-five cents (\$43.75) and thirty-one dollars and fifty cents (\$31.50) respectively should be denied and dismissed.

8. That the expenses of this arbitration in the total sum of one hundred forty-five dollars and twenty cents (\$145.20) as fixed by the Arbiter should, as agreed in Article 9 of the convention, be paid in equal parts by both Governments.

JAMES J. LENIHAN

Arbiter

OPINION

1. That James Pugh came to his death as a result of clubbing by the police, there can be no question. The record abundantly supports the conclusion. The doctors who concluded that death was due to cerebral hemorrhage and who, because the body showed no exterior marks of clubbing, inferentially, at least, determined that the hemorrhage might have been the result of physical defects, reached their conclusion as a result of a superficial examination. But the pathologist, Dr. Dart, reached his conclusion, that death was due to clubbing, after an autopsy of the body. He, too, found no marks on the body which might reasonably evidence a severe clubbing but Pugh was apparently a powerful man and the pathologist found that his skin was thick and tough. It was in the subcutaneous tissue that Dr. Dart found the real pathological evidence of the clubbing and what he found, as set forth in Findings XVII and XVIII, amply sustains his conclusion of death by clubbing. The fall into the street, whether a direct fall from the sidewalk without an intervening obstacle or one from the sidewalk onto the fender of an automobile and thence into the street, was but an incident.

2. The real problem here is to determine whether the clubbing was justifiable or was unlawful. Panamanian police, like the police of practically all nations, are equipped with weapons, including clubs. No one can or does contend that a policeman's club is an ornament only to be lightly twirled in his hand as he proceeds upon his tour of duty. It has such use, to be sure, and to the great majority of potential lawbreakers, such use has a deterring effect. But the primary duty of a policeman is to preserve law and order and the primary use of the club, with which he is equipped, is to compel submission to lawful authority when physical effort is insufficient for such compulsion.

The policeman's club is at once a dangerous and a necessary instrument in his hands—dangerous to him and to the recalcitrant. We say it is dangerous to the recalcitrant, because he must submit to lawful arrest and if he would, under such circumstances, match his superior physical powers with those of the policeman in order to resist arrest, he must suffer the consequences; and a real consequence is the possible and lawful use of the club upon him. And the citizen who would violate the law and then add to it a further violation by physically attacking the policeman, who is lawfully and under his sworn obligation attempting to arrest him, has no complaint if he suffers physical violence by the hands of the police or by his club should the policeman's hands prove ineffective. The right of the individual must ever be maintained, but the right of society is superior. A fundamental right of society is the right to law and order and the further right to compel obedience thereto by the individual. A first line of defense of law and order is the line of police. Obedience to law is not a matter of individual choice but is a matter of compulsion. Such being the necessary situation in organized

society, the obedience must be compelled by the use of force when that becomes necessary. Nor may submission to law be measured by the physical powers of the individual. If he is physically able to resist and is succeeding in resisting the policeman who is attempting to compel his submission, then the policeman can and must compel his submission by the use of the club which society has furnished the policeman for that very purpose. These, of course, are self-evident propositions but, too frequently we think, are they overlooked by the few who somehow feel that because a policeman's duties at times require the use of physical force, he must always and at all times and under all circumstances be physically able to physically defend himself and to compel submission by the use of his physical powers alone. Such people, of course, are completely oblivious to the fact that a policeman's weapons are not ornaments and have very definite uses in proper situations.

On the other hand, we have said that the club is dangerous to the policeman. It is and should be dangerous to him when he uses it unlawfully. His unlawful use of it should and does subject him to criminal prosecution and civil liability and it goes without saying that it should subject him to dismissal from his position. His responsibility is great and his position is delicate because he must not use his club when unnecessary and he must use it when necessary. Should he be remiss in either situation, he is and should be culpable. It is impossible to set forth the situations which demand and justify his use of his club, but what a policeman needs is judgment because if he has good judgment, he himself will generally recognize the propriety of its use when the occasion arises. And if he lacks judgment he has no place on the force because he then is a menace to, instead of a guardian of, society. A little authority is a dangerous thing and when the exercise of that authority is fortified with weapons the danger is enhanced. Add to that the fact that a policeman in exercising his authority is, of necessity, frequently drawn into brawls, fights and melees and we have a picture which should cause us to pause when selections are made. We give it as our view that the seriousness of a policeman's duties are too frequently overlooked when they are appointed. True it is that the great majority of them are excellent men, of sound judgment, and unspoiled by their authority. But there is a minority, whose authority goes to their heads, who seem to feel that it is their business to be uncivil, whose actions and manner invite the anger and resentment of citizens, who have a habit of seeking trouble, who have not the slightest idea of the real situations which would justify the use of their weapons and who, therefore, use them recklessly and unlawfully. As we said before, such men are in the minority but the fact remains that they, like the majority, are armed and one or a few of them can do untold damage to a community and too frequently cause unjustifiable and unnecessary injuries and even death to individuals.

3. We reiterate that it is impossible to set forth the situations which demand and justify the use of a club by a policeman. Rather can we arrive at

a conclusion by a study of a particular case. And so, in this case, we might first set forth some situations wherein the use of the club would be unjustified and where, as a consequence, the police would be culpable.

Pugh was drunk, but that fact would not justify clubbing him. He called the officers vile names; again the use of the club would be wrong. Suppose when the policeman laid hold of him, he held back, but did not strike or attempt to strike the policeman; still the club should not be used. Suppose he struck at the policeman and missed and the policeman was well able to handle him physically; there would be little excuse for clubbing him. Suppose he struck the policeman and the policeman necessarily struck him once with his club and subdued him; the policeman would be culpable were he to continue clubbing him. Suppose it was necessary to club him several times and that Pugh then fell down and was obviously subdued; further clubbing by the policeman would be unjustified.

But, as has been seen, we have not found such situations in this case.

4. Difficult as is the determination of the situations in which a policeman may and must use his club, it is much more difficult to determine as to how he should use it.

Naturally, much depends upon the circumstances of a particular case. So far as we know, no case of a policeman's culpability in the use of his club has turned upon the degree of force he used in a single blow. Indeed, it would seem that since the club is used in the heat and turmoil of a melee or fight, it would be quite impossible to attempt to measure the blow. The purpose of the blow is not to kill, but merely to stun or weaken. And yet a light blow upon one man might cause his death whereas a heavy blow on another might not even stun him. Again, one blow might be sufficient in one situation and several blows might be necessary in another. So, too, a blow aimed at a non-vital spot might land on a vital spot. In fine, there does not seem to be any possibility of precisely controlling the blows, once they become necessary. And so again the individual who invites the use of a policeman's club is in the unenviable and precarious position of taking his chances upon the results thereof. Of course, a large powerful policeman has no real cause to use his club at all upon a weak prisoner and were he to do so with all his force, the force of the blow might be a material circumstance in the determination of his culpability. But, as we view this case, such considerations do not enter into our conclusions.

5. This case offers no exception to general experience in the matter of conflict of testimony. Some of the witnesses state that the police maltreated Pugh; that they belabored him with their clubs without any reason therefor; that Pugh did not attack the police, but that they attacked him; that Pugh was submitting to and not resisting arrest. On the other hand, other witnesses state that Pugh was beating the police with his fists; that the police struck him with their clubs to defend themselves from his blows; that Pugh was not submitting to arrest but was violently resisting arrest.

Naturally all of these witnesses testified as to what they saw on the street. None of them knew what had happened at "Harry's Bar." We should say that when a policeman is seen belaboring an unarmed person with his club, the first impression is that he is maltreating such person. And we should say further that such impression would prevail even though the prisoner were resisting arrest because, after all, the natural sympathy of the onlooker is with the unarmed person and his natural criticism is of the armed person for the reason that there is a real abhorrence of the use of a club or a weapon upon an individual who is using his fists only.

Like all cases, however, we must view them according to law and our conclusion must be based upon all the material facts and not upon part of them. And so in this case material links in the chain are to be found in "Harry's Bar," and when considered in relation to the melee on the street, the conclusion is, we think, inescapable that James Pugh came to his death through his own fault and not through any excess of the powers reasonably vested in Manuel de J. Tunon and Jose Cardoze as police agents of the Republic of Panama.

6. James Pugh was a strong man, engaged in work which required and contributed to his strength. Prior to 7 a.m. on June 30, 1929, he had been drinking and from that hour to after 10 a.m. he was drinking steadily in "Harry's Bar." When the police arrived, he was drunk. His drinking did not affect his equilibrium or physical powers but apparently did befuddle his mental processes.

We doubt not that he was, when not in his cups, a peaceable man and we visualize him as a good-hearted Irishman. On the other hand, we doubt not that he knew his physical strength and was not averse to using it in defense of himself and his real or imaginary rights.

But, as the events here show, liquor evidently made him ugly and pugnacious when he believed he was being crossed and then his strength readily asserted itself.

When he had contracted a bill of one dollar and twenty-five cents (\$1.25) and then ordered more drinks for himself and companion, the bar-tender demanded payment before serving more. Pugh immediately assumed a surly attitude and threatened to pay nothing unless more drinks were served. Obviously, the bar-tender was well within his rights in demanding payment and in refusing to serve more. Obviously, too, Pugh was well without his rights in refusing to pay. In view of Pugh's surly and pugnacious attitude, it was but natural that the bar-tender should send for the police.

After the arrival of the two policemen, and upon the bar-tender telling them of Pugh's refusal to pay, Pugh, seemingly oblivious to the policemen or their authority, attempted to strike the bar-tender compelling him to seek security behind the bar. Did Pugh show any evidence of submitting to the authority of the police? He did not. On the contrary, he gave them every indication of utter contempt for them and their authority. He called them

a vile name and then peremptorily ordered them to get out of the place. Surely, his attitude was surly and pugnacious.

But it is to be noted that even after this display of contempt and pugnacity and after his calling them the vilest name that a man may be called, the police did not lose their tempers. They did not start in to belabor him with their clubs. What happened is that one of the police, Cardoze, left the place and left to his comrade, Tunon, the duty of taking Pugh to the station; should that be necessary.

So far as this record shows, policeman Tunon was not having great difficulty in taking Pugh to the station on foot until they reached a point near the International Cabaret. There is no evidence that Pugh struck the policeman or that the policeman struck Pugh prior to their arrival near the cabaret. But when they reached that point, Pugh struck the policeman and knocked him down. That Pugh was the aggressor, we have no doubt. The actions of the police in "Harry's Bar" do not fit in with a conclusion that one of them struck Pugh first. On the other hand Pugh's condition, his ugly mood and pugnacity displayed in the bar and his utter contempt for the two officers and their authority, all support the witnesses who testified that he struck Tunon and knocked him down.

It is clear that Pugh was then determined not to submit to arrest and it is clear that he proposed to use his physical strength to defeat arrest. He knocked Tunon down and Tunon was no physical match for him. It is also clear to us that Pugh did not stand idly by after knocking Tunon down. Apparently, about this time Cardoze came to the aid of his comrade. It was already demonstrated that Tunon was no physical match for Pugh and it was reasonable for Cardoze to believe that he was not physically able to subdue him. In such situation, it was in the natural sequence of things that Cardoze should use his club.

Since Pugh had attacked Tunon and knocked him down and since Cardoze was no more physically able to cope with him than was Tunon, and in view of Pugh's attitude, it is unreasonable to conclude that Pugh spent the minutes between the knocking down of Tunon in front of the cabaret and his fall at the alley alongside the cabaret, in merely warding off the blows of the police clubs. Rather do we conclude that after he was first struck with a club, he spent the intervening minutes in striking or attempting to strike the police and in warding off their blows. In fine, there was a general fight or melee between the police and Pugh and, as in all such fights or melees, both offensive and defensive tactics were indulged in by all the parties thereto.

Pugh came to his death as the result of clubbing but he received the clubbing while resisting the police and while striking them. In the circumstances, we find no evidence of a deliberate killing of him by the police; nor do we find any evidence of the police so using their clubs as to charge them as for a killing. To put it another way, there is no more evidence of a use of the clubs to kill Pugh than there is of a use of Pugh's fists to kill the police. What the

record discloses to us is the unfortunate and accidental death of Pugh brought on by himself by reason of his resistance to arrest, his striking the police and the consequent lawful use of their clubs on him without any intent, actual or constructive, of killing him but for the sole purpose of lawfully compelling his submission and of defending themselves.

7. Having decided that Tunon and Cardoze did not exceed the powers reasonably vested in them as police agents of the Republic, it necessarily follows that their actions were not malicious, voluntary and consequently culpable.

It, therefore, becomes unnecessary for us to decide whether the Panamanian Government should "be considered obliged to pay to the British Government an indemnity for such death" had we decided that the policemen did exceed their powers and that their acts were "malicious, voluntary, and consequently, culpable."

8. It will be noted that we have confined ourselves to the facts with relation to Pugh's death. All other alleged matters, such as the prosecution of the policemen in the Panamanian courts, etc., could only be material, if material at all within the purview of this arbitration, in the event we had found that the policemen did exceed their powers and that their acts were malicious, voluntary, and consequently culpable.

9. The representative of His Majesty's Government has filed with us, apparently to be taxed as costs and expenses under the terms of the convention, two bills for expenses incurred in having his briefs, filed with us, translated from the English into the Spanish language; the bills being for the sums of forty-three dollars and seventy-five cents (\$43.75) and thirty-one dollars and fifty cents (\$31.50) respectively.

The Arbiter is not sufficiently familiar with the Spanish language to attempt to decide the case on a record and briefs in that language. In view of the diversity of languages of the two parties, we directed that all briefs should be filed in both the English and Spanish languages. We did this, not only for our own convenience but also for orderly and expeditious procedure. As is seen, our direction has caused the expense claimed to his Majesty's Government. But the matter is as broad as it is long because it may be assumed that our direction has caused a like expense to the Government of Panama in having the briefs of its representative translated from the Spanish into the English language.

Article 9 of the convention provides:

The amount of expenses occasioned by the arbitration herein agreed to shall be taxed by the Arbiter in the judgment and paid in equal parts between the Government of the Republic of Panama and the British Government. It is understood that there shall not figure in said expenses those corresponding to the payment of fees to the special representatives that may be designated in accordance with Article 7 as, in the event of said designation, each Government shall pay, without any

obligation on the part of the other, the amount of the fees of its respective representative.

The literal language of the article does not preclude the taxation of the expenses of either or both parties in the matter of having their briefs translated in order to comply with our directions because the only specific expense which is precluded is that of fees of the representatives. But it could as successfully be contended and as reasonably concluded that stenographic and messenger expense, as well as the cost of paper and materials, should, on the same reasoning, be taxed.

We think, however, that the intent of the parties was that no expenses incurred by either of the parties in presenting their case should be taxed and that all their respective expenses, including the expenses of their translations, should be paid respectively by themselves. We have, therefore, denied and dismissed the claims of His Majesty's Government for the expense of the translation of the briefs of its representative.

The full purpose of Article 9 was to take care of such expenses only as the Arbiter might incur. We have asked no honorarium or fee for our services, it being perfectly agreeable to us to act in this matter as a friendly neutral to both Governments without compensation and with the sole purpose of rendering such assistance as we are capable of in settling their differences. But, of course, it was recognized that we might have expenses in the matter and, because of our limited familiarity with the Spanish language and because it was agreed that we should find our facts from a record which was in Spanish, an expense of the Arbiter known to both parties at the time of our selection as Arbiter and at the time of agreeing that the facts should be found from such record, was the expense of having the record translated from the Spanish into the English language.

The greatest expense to have incurred is that of such translation; the cost thereof being ninety dollars and twenty cents (\$90.20). We have also incurred other expense for a translation of the convention which we had made and which we submitted to the parties. In addition there are the usual incidental expenses of stenographic expense, messenger service, etc.

The total amount of our expense has been the sum of one hundred forty-five dollars and twenty cents (\$145.20) which, under Article 9, should be paid in the sums of seventy-two dollars and sixty cents (\$72.60) by each Government.

10. Conformable with our Findings and Conclusions, judgment is being made and entered this date.

Dated this 6th day of July, 1933, at Washington, D. C., U. S. A.

JAMES J. LENIHAN,

Arbiter

JUDGMENT

By virtue of the authority conferred upon me by the respective parties in their convention dated October 15, 1932, and

Conformable with and pursuant to the Findings of Facts made, and Conclusions reached, and the Opinion rendered by me on this date under the authority of said Convention,

It is ordered, adjudged and decreed this 6th day of July, 1933, at Washington, D. C., U. S. A., that the claim of His Majesty's Government against The Government of The Republic of Panama and growing out of the death of James Pugh be and the same is hereby denied and dismissed.

It is further ordered, adjudged and decreed that the claims of His Majesty's Government in the respective sums of \$43.75 and \$31.50 as the cost of translating the briefs submitted on behalf of said Government be and the same are hereby denied and dismissed.

It is further ordered, adjudged and decreed that the expenses of this arbitration be and they are hereby taxed and assessed in the total sum of \$145.20.

It is further ordered, adjudged and decreed that the said expenses be paid one-half or \$72.60 by His Majesty's Government and one-half or \$72.60 by The Government of The Republic of Panama.

JAMES J. LENIHAN
Arbiter

BOOK REVIEWS AND NOTES

Digest of International Law. By Green Haywood Hackworth. Vol. III, Chapters IX-XI. Washington: Government Printing Office, 1942. pp. vi, 820. \$2.00.

The welcome accorded the first two volumes of Mr. Hackworth's *Digest* will be renewed by those who read the third. Chapter IX deals with Nationality, Chapter X with Passports and Registration, and Chapter XI with Aliens.

The documents and discussions pertaining to nationality, in relation to its acquisition and loss, as well as the kindred matter of loss of right to protection, and which cover 434 pages, embrace consideration of the new Nationality Act of 1940. Through them the author has sought to portray the extent to which in American opinion, a country such as his own is both unfettered and restricted by international law in a variety of situations. He adverts, for example, to the views of the United States as to the loss of previous nationality produced by naturalization (pp. 161-164), and also to the differing views of certain other countries (pp. 165-207). He points to the extent to which the United States asserts the right to stamp the status of its nationality by birth upon the inhabitants of outlying territories and possessions (pp. 115-157). His distinctive service in connection with Nationality is seen in his frank portrayal of the changing interpretations by executive and judicial authority of the American statutory law and regulations, embracing the modifications of the latter through the Act of 1940. (See, for example, § 246, pp. 235-246, concerning "Action of Parents," and in relation to the case of *Perkins v. Elg*, 307 U. S. 325.) Again there is noted how the new statutory law, in contrast to that of March 2, 1907, causes specified periods of residence abroad on the part of a naturalized American national to produce loss of nationality, rather than a presumption of the cessation thereof (p. 286). These are essentially matters of domestic law in what concerns foreign relations, rather than of international law. Yet they are of utmost importance to private individuals in a variety of situations. Hence Mr. Hackworth's study is a helpful and revealing contribution.

In the treatment of passports and registration (pp. 435-548) the reader is made familiar with the purposes and various types of documents that are deemed to be passports (as distinct from so-called "special travel documents") (pp. 456-464), and with the unwillingness of the Department of State to permit the alien wives of American citizens to be included in the passports of their American-citizen husbands (pp. 464-465). The issuance and validity of passports, and war regulations applicable to such action, are dealt with (pp. 466-536). The registration of American citizens abroad is not overlooked (pp. 537-548).

Problems pertaining to aliens are treated from various angles. Documentary materials and discussions concern the matter of their entry and residence (pp. 549-552), their so-called personal rights and duties in a variety of situations (pp. 552-629), the standard of treatment applicable to them (pp. 630-640), discriminatory measures based upon race or creed (pp. 640-650), questions associated with indigent and insane persons (pp. 650-652), rights in both personal and real property (pp. 652-689), expulsions (pp. 690-705), and the treatment of corporations (pp. 705-717). Immigration and deportation are of course subjected to examination (pp. 717-820) in the special light of the legislation and treaties of the United States. In this connection the special responsibility imposed upon American consular officers by the Act of May 26, 1924, for decisions under the visa system is duly noted (pp. 741-748).

May the foregoing sketch suggest both the scope of the contents and the wealth of materials to be found in this latest volume of the *Digest*. They reveal the frank views of the Department of State on what is dealt with, oftentimes exemplified by those expressed by its Legal Adviser. That revelation has made the book invaluable to this reviewer as it doubtless will be to other readers.

CHARLES CHENEY HYDE

Annual Digest and Reports of Public International Law Cases, 1935-1937.

Edited by H. Lauterpacht. London: Butterworth & Co., 1941. pp. xlx, 514. Index. 50s.

The appearance of this volume in such complete form during the stress of war and notwithstanding the irregularity or interruption of postal communication and the dispersal of contributors, excites the admiration of the readers who welcome it. It may be noted in passing that the generous aid of the Carnegie Endowment for International Peace has made the publication possible, and that Professor Lawrence Preuss, of the University of Michigan, is the learned American contributor. The preface indicates that a volume covering the years 1938-1940 may be published in 1942 and that thereafter the *Digest* will appear practically up to date with only a necessary gap of a year or so. Readers should bear in mind this time lag, for appeals and overrulings may occur in that period. It is noted that "it is not intended to digest decisions of Prize Courts save in so far as they raise questions of general international law."

The classification at the beginning of the volume is practically the same as that of previous volumes, being divided into eleven main parts. The digested cases cover 12 decisions of international tribunals, including the semi-private arbitration of the Inter-ocean Transportation Company before Judge Hutcheson, p. 271; and 269 decisions of national courts, of which the largest number, 58, is from France. The United States is represented by 43 decisions, Italy by 33, Argentina by 20, Germany by 20, Holland by 18, Egypt by 15, Switzerland by 10. There is a scattering of decisions from 15 other

countries. It is most satisfactory that the digests are made as much as possible by direct quotation from the decisions. "The paraphrasing of a decision is now the exception." Of course, some of the lengthy and involved decisions of international tribunals cannot be always handled in this manner.

The comments on the decisions are most valuable. It is no reflection on the very high quality of the work to refer to a few points that occur to the reviewer. As to the arbitration of the Interocean Transportation Company, above mentioned, it is understood that there have been other similar arbitrations arising out of the United States-British Agreement of May 19, 1927. In the case of the Lehigh Valley Railroad Company before the United States-German Mixed Claims Commission, it would have been convenient if the note at the end of the digest had contained a reference for the information given. A few of the summaries of facts are too brief for an adequate understanding of the case, as, for example, Cases Nos. 121 and 141. It must be a little confusing to foreign readers to find the judges of the lower courts and the appellate courts in the United States listed together.

There are many subjects of interest to American lawyers and publicists, such as Executive Agreements in the United States (No. 15), sovereignty over the air (No. 51), enforcement of foreign confiscatory decrees (No. 72), requisition of ships (Nos. 70-73), state succession in respect of rights, public debts, laws, and treaties (Nos. 39-47), expulsion of aliens (Nos. 159-163), immunity of foreign armed forces (No. 101), international status of British Dominions, Ireland and India (Nos. 21, 22, 24), occupation of enemy territory (No. 231), sanctions and *rebus sic stantibus* (No. 201).

On the interesting subject of the individual in international law one case is digested on the position of the individual with cross references to municipal law and treaties, and the topics of nationality, aliens, extradition and minorities are treated under this general heading. It may be remarked, however, in this connection, that all of the cases digested, except a handful, involve individuals in their relations to one another or to the State or its agencies. I daresay this subject in the future will receive special consideration, since it is, after all, the individual who is most affected by the application of the principles of international law.

The *Annual Digest* over nearly a score of years has put the lawyers and teachers in debt to its industry and scholarship; it smote the rock of pent up sources and a stream of learning gushed forth. L. H. WOOLSEY

Cordell Hull: A Biography. By Harold B. Hinton. Garden City, N. Y.: Doubleday, Doran & Co., 1942. pp. xiv, 377. Index. \$3.00.

This first extensive biography of Cordell Hull is also a chronicle of the events which gave him his opportunities and which he helped to shape. It shows that Hull never missed a main chance. He was always prepared by hard study for the next opportunity, and then by further sustained work he

mastered a wider field until at last the world itself became his province. For example, years of opposition to the bad domestic effects of tariffs led him into the research which revealed the even more dangerous international effects of protective tariffs.

The chapters about Hull's early years reveal not only his industry but the powerful influence of his father, who early began to accumulate a large fortune, for Tennessee hill country, and who backed Cordell for all the education available and at every later stage of his career. Hinton's accounts of Hull's earlier years, of his youthful career in the legislature and of his vigorous enforcement of criminal law while a circuit judge, from 1903 to 1906, are among the most interesting because least known.

The chapters on his Congressional career portray him as the father of the income and inheritance taxes, most powerful of all engines for social change. His part as one of the key organizers of the famous revolt against Speaker Cannon's rule in 1910 is brought out, and his disgust with Democrats who got protection for their constituents in Republican tariff laws and then registered ineffective "Nay" votes is described. Tariff apostacies led to one decision to retire, though election to the Senate in 1930 forestalled that. One involuntary retirement, due to the Harding landslide in 1920, led to a most successful chairmanship of the Democratic National Committee.

The book contains new pictures of Woodrow Wilson's inspiring leadership, of Coolidge's "curious" presidency, of the 1933 bank crash and of the follies of the period of neutrality legislation. Nye's success in rewriting the history of our entry into the last war is delineated and the incredible follies of Hamilton Fish detailed. The sorry period during which the United States assisted in the strangulation of the Spanish Republic is not omitted.

Throughout these disastrous years the House leaders insisted they could defeat the isolationists, but the Administration was afraid of the Senate. The author believes that Hull attached far too much weight to the power of the National Council for Prevention of War and the Women's International League for Peace and Freedom. The Administration tried to persuade Congress to leave it ability to face the gathering storm, but was always outdone by the headstrong isolationist leaders, four of whom "blackjacked" one "neutrality" law through. Only in five successive Pan American Conferences, which are fully described, was Hull able to build a growing structure of coöperation against the gangster attempts to conquer the world. There are extensive accounts of the London Economic Conference fiasco of 1933, and of the long effort to reason with Japan, an endeavor we are led to believe had some prospects of success.

Perhaps no Secretary of State, or President, could have prevailed against the follies which were so loudly asserted during the years before 1939. In his foreword to the book Sumner Welles estimates Hull as "a persuader rather than a leader," and "as the least self-seeking man I have ever known." Never surely has a statesman told his fellowmen as persistently what things

they must do to be saved. Doubtless Hull could not have persevered had not his earlier experiences convinced him that "the democratic process has the faculty of slowly, painfully and inefficiently achieving the greatest good for the greatest number over a sufficiently long period of time." The time consumed in achieving a rational organization of the nations has already been disastrously long, but this book makes it plain that Secretary Hull has done what he could to establish the guideposts to man's greatest achievement.

This biography is an excellent start toward the evaluation of a great Secretary of State. It is interesting, reads easily, has enough human anecdotes and gives a view of our own times which it will profit any reader to survey. The record of our follies is impressive, but not too discouraging when interwoven with the constructive life of a self-made man who has demonstrated indefinite capacity for growth—a heartening example of how to face the future.

D. F. FLEMING

The Problems of Lasting Peace. By Herbert Hoover and Hugh Gibson. Garden City, N. Y.: Doubleday, Doran & Co., 1942. pp. x, 295. Index. \$2.00.

This notable volume by a distinguished former President in collaboration with one of our best-known career diplomats is one of the most thoughtful contributions to the solution of the problems of peace and post-war reconstruction that has appeared. The experience of the authors in world affairs entitles them to a careful hearing.

The authors begin by stating that their book is based upon victory and an American point of view. They insist that the war must be won; this is our first and immediate task. But the "second and equally difficult undertaking is to win a lasting peace for the world." To win the peace we must have "aims" and "ideals" and machinery to translate these into realities.

In Part I the authors list seven dynamic forces—a keynote of the whole volume—that make for peace and war. These are: 1. Ideologies; 2. Economic pressures; 3. Nationalism; 4. Militarism; 5. Imperialism; 6. The complexes of hate, fear, and revenge; and 7. The will to peace. These are examined in order and illustrations are given for each of them. Earlier wars and crises are reviewed from the period of the Thirty Years' War, and the seven dynamic forces are traced through the past 168 years down to the present time. Brief summaries of some of the commonly known peace plans (such as those of Dante, Dubois, Henry of Navarre, Crucé, Penn, Saint-Pierre, Rousseau, Bentham, Kant) are given.

In Part II there is a discussion of the First World War and the seven dynamic forces are followed through the period of the Armistice and the making of the peace at Versailles in 1918-1919. Continuing their topical pattern, the authors trace the seven forces through the twenty-year period after Versailles. At the Paris Peace Conference the "will to peace" was

notably manifest. Indeed Messrs. Hoover and Gibson go so far as to say that

The efforts at international organization to preserve peace rose to greater heights in the period of twenty years from 1919 to 1939 than ever before in all the history of man. Great experiments were tried and failed. But from this very experience the world may have found real guidance to the Promised Land . . . (p. 148).

There is a description of the League of Nations, its organization, its purposes, its successes and failures. The League was "born of Liberalism" and when representative government perished in a number of its member nations a fatal blow was thus struck against the League itself. After listing some of the constructive achievements of the League, six causes for its failures are set forth, *viz.*: (1) the survival of power diplomacy; (2) the inability to formulate a European policy of peaceful reconstruction; (3) the total collapse of sanctions; (4) the failure to secure disarmament; (5) the failure to revise onerous treaties; and (6) internal weaknesses in the structure of the League. Each of these points is examined in turn. The failure of the United States to join the League is discussed. Apparently the people were not ready for full participation in the Geneva organization and no political party would carry the issue to the people. Both of the authors, however, regretted non-membership of the United States in the League and the World Court.

Truth and sincerity mark the words of the authors when they tell us in Part III that

Discussion, debate, and understanding by our people prior to the ending of the war are necessary if adequate plans are to be drawn. And the American delegates to the peace table should not only be armed with the principles of peace which America believes workable, but they should have an understanding people behind them (p. 197).

What are some of the foundations of lasting peace? According to Messrs. Hoover and Gibson they are (1) clear and practical peace terms with the methods of peacemaking handled by the United Nations; (2) representative government; (3) immediate lifting of the food blockade when firing ceases, with all governments aiding in providing supplies for the needy peoples, including enemy and liberated peoples along with others; (4) a recognition of the principle of economic freedom "regulated to prevent abuse," and in the long view the restoration of "international trade to free enterprise." Stabilization of currencies by international action is proposed. Quotas, monopolies, and cartels are condemned, and if tariffs are retained they should (a) be equal to all nations and (b) be no higher than will preserve fair competition of imports with domestic production. The "have" and "have not" argument regarding raw materials is roundly deflated, and the authors clinch their arguments at this point by reminding us that

The whole experience of the past hundred years shows that the assurance of supplies of raw materials requires only a dissolution of mo-

nopoly controls, an assurance of equal prices, open markets—and peace (p. 221).

Migration, freedom of the seas, nationalism, imperialism, and militarism come in for discussion. The leaders of the nations who brought the war to the world should “be made to realize the enormity of their acts.” Too long has it been assumed “that there is something sacred about the heads of state who project or provoke war and wholesale murder.” But even so, “victory with vengeance is ultimate defeat in the modern world. We can have peace or we can have revenge, but we cannot have both” (p. 248).

Under the heading of “Methods of Preserving Peace” eight “plans” are discussed, *viz.*: 1. Restoration of the League of Nations under the Covenant as it stands; 2. A revised League with “absolute military power to enforce peace”; 3. A revised League acting as an effective Council of Nations to preserve peace solely by pacific settlement and for building international coöperation; 4. A separate military organization of the leading allied nations to preserve order; 5. Regional organizations responsible for peace in certain regions but coöperating in pacific settlement through some form of world organization; 6. Extreme isolation; 7. Federation of Nations; 8. Pax Americana. The reviewer might add that a discussion of a World Commonwealth and the United Nations as the nucleus of the coming world political organization is also in order.

The authors neatly shy away from an outright espousal of any particular plan; they give arguments for and against the various proposals. They do insist, however, that the peace must rest upon adequate machinery of international coöperation and economic freedom regulated to check abuses. They suggest that the peacemaking should be divided into three stages. The first would be that of making immediate settlements that will not brook delay. The second would be that of an intermediate period for rebuilding of political life and economic recovery. The third would be the period for settlement of long-range problems which require a cooling off of emotions and careful deliberation.

An Appendix carries a brief summary of the major and minor successes and failures of the League of Nations and some materials dealing with peace-making outside of the League. There is also a list of military alliances, non-aggression pacts, and mutual guarantees of frontiers made outside the League. The last section of the Appendix lists a number of “violent actions during the life of the League.”

The authors have rendered a real service by putting out this thoughtful volume. They have carefully and earnestly analyzed the great issue of war and peace. If they have not pinned their hopes to any particular solution, they have provided the reader with arguments so that he can pick out the scheme which he thinks is best. At any rate, all prospective peacemakers, all citizens, and all seekers after the better world should study this timely book.

J. EUGENE HARLEY

Mission to Moscow. By Joseph E. Davies. New York: Simon & Schuster, 1941. pp. xxii, 659. Index. \$3.00.

As a camera slowly brings a distorted scene into true focus, so *Mission to Moscow* clarifies our thinking regarding the gigantic social and political experiment of the U.S.S.R. during the past few years. Through the unbiased, impartial and observant eyes of Joseph E. Davies, United States Ambassador to Russia from 1936 to 1938, we come to see the inevitably profound effect this experiment is to have on the future of the world. The volume is unique in that Ambassador Davies was able to persuade the Department of State to permit the inclusion of many of his strictly confidential despatches to the Secretary of State, not only while he was our representative in Moscow, but also excerpts pertaining to the Russian situation from later despatches while he was Ambassador to Belgium. In addition to his official correspondence, Ambassador Davies kept both a diary and a journal, and numerous entries from these sources, together with excerpts from personal letters to friends and members of the family, furnish a much more graphic picture than would have been possible if the volume had been limited to purely official reports.

For a non-career diplomat, comparatively unacquainted with the complexities of European diplomacy, Ambassador Davies possessed a remarkable facility for grasping the essential trends and drawing logical and accurate conclusions. His evaluation of the rapidly changing situation was amazingly prophetic—he foretold almost to the day the outbreak of the war—he foresaw the Nazi-Soviet Pact forced by the inane and futile policy of Chamberlain; and when military experts were predicting the quick disintegration of the Soviets under the Nazi panzer columns, Mr. Davies expressed complete confidence in the ability of the Red Army to resist.

Some of his most effective work was done in personal, friendly discussions in an unofficial capacity, when official representation would have been both inadvisable and detrimental. He believed in obtaining his information at first hand, and his reports on the industrial development of the country from personal observation in all parts of the Soviet Union are models of lucid and objective reporting. Even the treason trials and subsequent purges are examined with a judicial and unbiased attitude.

There is very little in the book pertaining to diplomatic practice as such, other than a few violations of strict diplomatic protocol. Rather than delay until the return of Foreign Minister Litvinov, Ambassador Davies presented his credentials to first assistant Krestinsky. On one occasion he startled Moscow by giving a dinner in honor of the Red Army which was attended by the "High Command," "Hero Flyers," and even famous parachute jumpers. On another, while passing through Berlin, Davies had a long visit with Schacht and made a report direct to President Roosevelt without mentioning the fact to Ambassador Dodds. A few minor mistakes should be eliminated: Dr. Holsti is not a baron and he lectured and is still lecturing at Stanford, not Leland, University.

Mission to Moscow is a superb presentation of a critical period of international politics by an intelligent observer who possessed in the highest degree "an open mind and an understanding heart." GRAHAM STUART

Hungary at the Paris Peace Conference: The Diplomatic History of the Treaty of Trianon. By Francis Deák. New York: Columbia University Press, 1942. pp. xxiii, 594. Maps. Index. \$5.50.

My particular interest in Hungary may be said to have originated in the circumstances that my father was present at the reception of Kossuth when, during his tour of the United States, he visited Philadelphia. The popular tumult that attended him gained for him the sobriquet of the "Hungarian Whirlwind." Not unnaturally, my first tour of Europe included the Balkan States, and particularly Servia, Rumania, and Hungary. I last traversed them seven years after the coming into force of the Trianon Treaty.

In a foreword to the present volume it is suggested that for the failure of the Treaty of Trianon to establish a fair political, economic, and social equilibrium in southeastern Europe, the responsibility must be borne by the European Great Powers and, at least to some extent, by the United States; but it is intimated that, for the fateful blunders that were actually made, France must be held chiefly responsible. To this suggestion it might be possible to assent if the United States, having become a party to the war, had not been represented at the peace conference by its President. To this fatal error, whether it was due to a want of foresight, to a lack of knowledge of international affairs, or, as we are justified in believing, to a combination of both, must chiefly be ascribed the disastrous defects of the treaty. In the case of all the other countries concerned the acts of their plenipotentiaries could be disavowed or modified by the government at home. When the President of the United States himself sat at the peace table, only the Senate could revise his judgments and correct his mistakes. This it proceeded to do; and, for exercising in the matter its constitutional powers, and performing its constitutional duties, it is to be commended.

In his researches Professor Deák has left no accessible source unexplored; nor has he omitted in his survey any pertinent phase. In an introduction he surveys the antecedents and the formulation of the Armistice of November 3, 1918, and the incipient disintegration of the Austro-Hungarian monarchy, including the part played in it by the representatives of the United States, not indeed willfully, but by yielding to the passionate tide which they found themselves unable to moderate. To those acquainted with history there should have been in this nothing unexpected. Had we so soon forgotten our own doleful era of "Reconstruction," following our Civil War? The saying that to be forewarned is to be disarmed has little foundation in history.

With meticulous care, and a comprehension not heretofore essayed, our author narrates the history of Hungary's frontiers, and the allocation of her territory to other states. Not unnaturally this impoverishment gave rise

to a communist régime, and to foreign intervention for its suppression. The story of this important phase is told in ample detail. Naturally, yet more space is devoted to the terms of the peace, and to the secret negotiations by which they were brought about.

In a chapter entitled "Conclusions," the author enters the realm of forecast, but in an optative rather than prophetic vein. He accordingly expresses the hope that, "whatever errors may mark the next peace settlement, they will not be repetitions of those which characterize the treaties of 1919-1920"; and he ends with the benevolent suggestion that, "by looking not at the next elections but at the prosperity and happiness of the next generation, many of the pitfalls may be avoided." This sentiment all humane persons may be supposed to share except the rulers, who perchance may not be inclined either to question their superior capacity or to relinquish the powers and emoluments of office.

JOHN BASSETT MOORE

World Order in Historical Perspective. By Hans Kohn. Cambridge: Harvard University Press, 1942. pp. xvii, 352. Index. \$3.00.

Professor Kohn now offers the fourth (and last) in the series of penetrating and provocative studies in which he has tried to awaken the democratic world to the nature of the conflicts of the post-Versailles era. Much of his thesis sounds anticlimactic in the days after Pearl Harbor and in view of what so many persons of prominence have recently been saying concerning the fundamental conflicts between the democratic and fascist ways of life. To Professor Kohn, however, it is still essential that the democracies should have the fullest appreciation of the nature of fascism if they are to win the war and, what is even more important, if they are to win a lasting and secure peace. They must grasp all of the implications of the fact that Germany and Japan, far from being "normal governments within the common framework of the accepted values of human civilization . . . had in reality abandoned the framework of civilized values and began a relentless campaign to destroy it" (p. 212). Unlike ourselves, the Nazis have long had a clear awareness of all that was implied in the growing crisis, and their "return to tribalism", since it is a conscious rejection of the foundations of civilization, is all the more to be feared for that reason.

Professor Kohn insists that the democracies must revive their faith in the spiritual values of the democratic way of life. He has no patience with cynics who "reason" that "the inconsistencies and inadequacies of democracy" are not essentially different from "the rejection of all liberty and equality in National Socialism" (p. 224). The focus of the democratic way is contained in the formula "Liberty and equality, peace and justice" (p. 220), which Kohn warns must never be dismissed as meaningless abstractions. All power, he feels, must be exercised subject to restraint, and this is elementary to his characterization of democracy: "Democracy is faith in the dignity of the individual, in the equality of men, and in the common tie of

humanity; it reposes upon the deep conviction that all men and all nations obey the same rational law, the existence of which alone makes an understanding between men possible and without which men would live in fear, oppression, and perpetual war" (p. 222).

International lawyers will probably be misled by the title of the book, because the author appears to understand by "order" not so much a system of law, government, and political organization, as a system of ethical principles. Yet his essential points are clear: democracies cannot win this war unless they fire themselves with a faith in a democratic way of life which they trouble to comprehend; and, in the words of Norman Angell, their eventual survival, "in so far as that is a matter of the effective use of their force, depends upon their capacity to use it as a unit, during the War and after" (p. 272). There could be no stronger argument for retaining, as fundamental to the post-war settlement, the habits of unity which are growing out of the coöperative efforts of the United Nations. H. ARTHUR STEINER

The House Committee on Foreign Affairs. By Albert C. F. Westphal. New York: Columbia University Press, 1942. pp. 268. Index. \$3.00.

Dr. Westphal has undertaken work in a new field. This is probably the first attempt of any student of political science or history to investigate in such detail the history, organization and methods of work of any committee of either House of Congress. He has had access not only to the reports and the printed hearings before the committee, but also to the unprinted hearings on bills which were never reported to the House, and to the files of the committee, some of which were of a confidential nature. Like an adventurer working his way through a hitherto unexplored country, he has been able to report many interesting discoveries, but such an explorer would hardly be able to return with a complete and accurate map of the whole region.

The original purpose of the author was to make "a full length study of the rôle of the House of Representatives in foreign policy," which would require discussion of the work of many committees which deal with matters affecting our foreign relations, such, for example, as immigration and the fortification of Guam. The author suggests that, while the President has full freedom in the conduct of foreign affairs, there is a limit in such matters to his power to determine foreign policy, and though there is unity of purpose now between the executive and legislative branches of our government, Dr. Westphal expresses the belief that "a return to a period of peace will revive the contest between the President and the Congress on matters of foreign policy."

This monograph deals only with the one committee of the lower House that has jurisdiction over matters that deal most directly with our foreign relations. The book outlines briefly the method of the Continental Congress in dealing with foreign affairs and the later practice of the House under the Constitution which referred such matters to special committees until the creation of the permanent committee in 1822. The chapter on The

Committee at Work distusses hearings and other sources of the committee's information, its deliberations, its relations with the Executive. Other chapters deal with the committee's method of handling legislation relating to the Foreign Service and the State Department, treaties, and in considerable detail the committee's attitude toward the recent questions of the arms embargo and neutrality. In a final chapter the author sums up the results of his interesting investigations.

H. W. TEMPLE

International Air Transport and National Policy. By Oliver J. Lissitzyn. New York: Council on Foreign Relations, 1942. pp. xviii, 478. Maps. Index. \$5.00.

This book could not have been written without an opportunity for widespread research covering the conditions of air transport throughout the world prior to the present war. The author, as research fellow of the Council on Foreign Relations, participated in the discussions of one of its study groups and the book, therefore, serves, at least on its factual side, as a more permanent record of these discussions. The opinions or conclusions set forth are those of the author.

The chairman of the group, former Assistant Secretary of the Navy for Aeronautics, Edward P. Warner, in a brief foreword, has indicated the need for this study when he says that the return of peace will not restore the old conditions of air transport. As Mr. Warner wisely remarks: "The dangers of a misuse of airpower have become so apparent as to make it certain that the victorious nations will adopt new controls to the end that future aggression may be unable to avail itself of civil aviation either as a direct instrument of aggression or as a blind." Indeed, as the author points out, the airplane's large-scale use was developed not in peace time but in war and today the dominant factor in air transport is its military usefulness.

The author describes the great air routes of the world prior to the present war, the pervading national competition, whether by public or private operation, and the treaties under which these routes were established. The economic aspects of air transport peculiar to the various countries of the world are set forth and the close relationship to their general national economy emphasized. This leads to governmental control in whole or in part. The author uses the term "statization" to convey the idea of the development or extension of state participation. This nomenclature seems rather cryptic. We hope that writers in this field will not fall into the habit of attempting to solve complex questions merely by inventing new terminology, although we do not accuse the author of so doing. Indeed, under the more natural heading of "Government Promotion of Air Transport" he has made a detailed study in many countries and these studies lead to his conclusion that air transport is an instrument of national policy closely connected with military air power. This of itself places international air transport within the field of international politics and diplomacy.

We are inclined to agree with the author that freedom of the air is not likely to become a reality even after peace is restored. The new developments of air transport as a result of the present war will make the problem still more menacing. With these problems the author has not assumed to deal, although he intimates that they can be eliminated probably only by the establishment of a system of world order.

ARTHUR K. KUHN

The Inter-American System—A Canadian View. By John P. Humphrey. Toronto: Macmillan Co., 1942. pp. xiv, 329. Index. \$3.00.

The idea that Canada must be a party to the Pan American organization has floated in the international atmosphere of our continent for a long time. That idea has now found concrete and substantial expression in this book, in which Mr. Humphrey makes a conscientious and exhaustive study of all the aspects of the problem.

Five outstanding factors are discernible in regard to the question of Canada joining the Union of the American Republics, to-wit: first, that Canada is geographically an integral part of the Western Hemisphere; second, that Canada has attained international personality; third, that Canada has been officially declared to be within the scope of the Monroe Doctrine, which is now a multilateral policy of the Americas; fourth, that Canada maintains commercial, cultural and social relations of extraordinary importance with the United States and has begun to extend such relations to the other nations of the American continents; and fifth, that the total war in which virtually the whole world is now engaged is imperatively calling for pole-to-pole, ocean-to-ocean solidarity in the Western Hemisphere. Whether these factors, favorable to Canadian coöperation with Pan America, can or cannot, should or should not prevail over the adverse factors emanating chiefly from the political status of Canada as a member of the British Commonwealth of Nations, is the subject matter of which the author treats with excellent method and remarkable lucidity.

After laying down the problem in the first chapter, the author devotes the following five to a historical review of the development of the Pan American movement from the days of the Congress of Panama in 1826 to the present hour, when our hemisphere is confronted by the menace of the Berlin-Rome-Tokyo Axis. The next two chapters deal with the institutional bases of Pan Americanism and the actual and potential rôle of Pan America in the world order. The last chapter has for a title the basic question, Should Canada Join? which the author answers in the affirmative. Besides recognizing the existence and stressing the significance of the five factors above stated, Mr. Humphrey maintains that nationhood imposes on Canada a responsibility to coöperate with other nations in promoting international order, and points out the inconsistency of Canada's joining the League of Nations while remaining outside the American union. He recalls, furthermore, that Canada has already participated in important Inter-American

gatherings and that the American Republics have, on several occasions and in different ways, evinced their desire to have Canada officially incorporated into the concert of the new world.

The book contains a penetrating analysis of the continental system of relationships, and its factual contents are supported by abundant citations of authorities and official documents. It is a readable, scholarly work on a phase of hemispheric organization that is of palpable interest to every student of Inter-American affairs. RICARDO J. ALFARO

Conditions of Peace. By Edward Hallett Carr. New York: Macmillan Co., 1942. pp. xxiv, 282. Index. \$2.50.

On the basis of an experience of twenty years in the British Foreign Office and six years as Wilson Professor of International Politics at Aberystwyth, Professor Edward Hallett Carr has contributed a very thought-provoking study to discussions of the post-war peace. Peace-making, he emphasizes, is not an event, but a continuous process, and "anyone who supposes that it will be completed within six years should be regarded with the utmost suspicion."

The present war he regards as "an episode in a revolution"—a revolution against the nineteenth century ideas of liberal democracy, national self-determination, and *laissez-faire* economics. To demonstrate his thesis that a "major revolution" exists against what he calls "liberal" democracy, he resorts to a singularly strange argument: Soviet Russia, Germany, Italy, Poland, Portugal and much of Latin America have "revolted" against democracy! Since not one of the countries listed ever was a democracy, his argument proves only that states which never were democratic remained unconvinced of the error of their ways even after Woodrow Wilson had shown them the light.

In his next argument, he is on firmer ground: even within democracies, political rights have come to appear meaningless and irrelevant to people without jobs or three meals a day. The removal of economic inequalities will become as important a part of "the new democracy" as the possession of political rights, but "the distressing fact is that the practical application of this ideal has perhaps been carried furthest not in countries possessing representative government, but in countries which reject it." The task of democracy is clear.

In writing on self-determination the author displays some befuddlement because of his failure to distinguish clearly political, ethnic, and legal aspects of the problem (see p. 40 ff.). However, he sees clearly (in the words of F. L. Schuman) that to pledge in the name of self-determination only a resumption of the anarchy of power politics is to promise nothing relevant to the needs of desperate peoples. On economics, Professor Carr's approach is refreshing: state planning and international planning must henceforth be for the consumer, not the producer—just as today "control is exercised in the interests of the consumer, i.e., the war machine; and relations between

the different branches of production are . . . determined by the order of priority of the consumer's needs."

The last half of the book, which appears to be more carefully thought out than the first part, outlines a suggested British policy at home, towards the world, towards Germany, and towards the New Europe. There is scarcely a reference to international law, and not much on international organization, but this is precisely the type of book which will prove useful and stimulating to those students of international law and organization who believe that no renovation of international law can be made merely in terms of itself.

HERBERT W. BRIGGS

Czechoslovak Yearbook of International Law. Editors: Václav Beneš, Alfred Drucker and Edward Taborský. Published under the auspices of the Czechoslovak Branch of the International Law Association. London: Donington House, 1942; American representative, J. Hanč, New York City. pp. viii, 236.

This collection contains a number of essays by several British authorities, among them J. L. Brierly (Law, Justice, and War), George W. Keeton (Legal Guarantees of Peace), and others. That they are thought-provoking goes almost without saying. Prof. A. Berriedale Keith, in his article on the "Sanctity of Treaties," brands as "inexcusably false" the statement of Mr. Chamberlain in the House of Commons on October 6, 1938, in his attempted justification of Munich, that "We had no treaty obligations and no legal obligations to Czechoslovakia," because there were such obligations under Article 10 of the Covenant of League of Nations.¹ Quite informative are the articles by Mr. Alfred Drucker (The Legislation of the Allied Powers in the United Kingdom) and Mr. Egon Schwelb (The Jurisdiction over the Members of the Allied Forces in Great Britain). Mr. Georg Schwarzenberger makes out a strong case for the present legal basis for punishment of war criminals (War Crimes and the Problem of an International Criminal Court).

If any criticism is proper of the collection, it is because of certain omissions and an incomplete and novel presentation of facts known to careful observers. Mr. Edward Taborský's discussion of "'Munich,' the Vienna Arbitration and International Law" is extremely useful, but fails to include certain declarations of the former President, Mr. Edward Beneš, which have somewhat puzzled students of international events. In Washington on June 29, 1939 (*Washington Star*), in discussing the pre-Munich situation, Mr. Beneš declared that "I could have made war last September. A million armed Czechs were ready to fight for their country. But I did not." Ambassador Dodd on April 4, 1935, records that he "learned of an interview with Beneš, about the end of March, in which the Czech Premier said his country would fight . . . if its allies helped; otherwise, there was nothing to do but capitulate to Germany's terms. . . ." The report made to the Czechoslovak

¹ On this point see also the reviewer's article "Czechoslovakia — A Lesson and a Symbol," in the winter number of the *Virginia Quarterly*, 1938.

Parliament, after Munich, but prior to the occupation of Prague, demanding an investigation of Beneš's pre-Munich policy, contains a series of startling assertions. All these matters are ignored in the collection.

The reviewer unreservedly accepts Mr. Taborsky's position that the Munich award is illegal both as a matter of international, as well as Czechoslovak constitutional law. But if constitutional provisions are stressed in one respect, they must be followed in other respects. Mr. Beneš resigned as President immediately after Munich and left Prague as a private citizen. What, then, is the present legal basis to his and his supporters' claim, as President of Czechoslovakia? British and American recognitions of the Czechoslovak provisional governments are presented in a novel way as shown by the title: "The full recognition of the President of the Czechoslovak Republic and of the Czechoslovak Government by Great Britain and their recognition by the United States." An excerpt from a letter of Lord Halifax, dated July 21, 1940, to Mr. Beneš declares "His Majesty's Government in the United Kingdom are happy to recognize and enter into relations with the provisional Czechoslovak Government . . ." (*The Central European Observer*, August, 1940.) It is claimed that a subsequent letter of July 18, 1941, by Mr. Anthony Eden, recognized Mr. Beneš as President. If this is so, can governments recognize as presidents of other states individuals who have resigned and whose successors were constitutionally elected? The American *recognition* (July 30, 1941, State Department Press Release No. 365) declared readiness "to enter into formal relations with the Provisional Government established at London for the prosecution of the war and the restoration of the freedom of the Czechoslovak people, under the presidency of Mr. Beneš, and while continuing its relations with the Czechoslovak Legation, would be pleased to accredit to the Provisional Government an envoy. . . ." The presidency here referred to is clearly presidency of the Provisional Government and the envoy is accredited to this Provisional Government. Again, what is the distinction between a "full recognition" of its president and a mere "recognition"? No doubt, there is reason for such novel claims and presentations, but they require further elucidation. Incidentally, Mr. Beneš, under his claims to the presidency, on October 15, 1940, issued a decree regarding "the temporary exercise of legislative power." Under his decree of July 21, 1940, a state council was instituted as something of a substitute for parliament. This body "has, however, only the function of advising the President or the Government." Thus, in fact, Mr. Beneš governs (?) by decree. This method raises interesting questions for the future.

CHARLES PERGLER

Toward International Organization. A series of lectures at Oberlin College. New York and London: Harper & Bros., 1942. pp. x, 218. \$2.00.

Writers on post-war collaboration often go to one of two extremes. On the one hand, disillusioned as to the possibility of progress, they advocate a

return to the balance of power, or, on the other hand, tending toward Utopianism, they propose the establishment of some vast federal union of states. The contributors to this volume, however, adopt for the most part a more realistic attitude, and their lectures, delivered at Oberlin and presented here as a symposium, show considerable sense of measure. The work of outstanding authorities representing various disciplines, this is the kind of scholarly forum which is greatly needed at the present time.

Professor Howard Robinson reviews early schemes for international union, sketches the peace movement, and analyzes the genesis of the League of Nations and reasons for its failure. The present reviewer cannot accept without qualification his statement that the League lacked "any effective way to coerce guilty members." The means were there; it was the will which was lacking. The economic causes of international conflict are analyzed by Professor Wooster, who thinks the present war was due in no small part to American policy, particularly the reparation-debt policy, the Hawley-Smoot tariff, and the scuttling of the International Economic Conference. While believing that this country should take the lead in the search for a saner economic order, he doubts whether we are really fitted to assume this rôle.

Professor Lerner emphasizes the grave consequences of the failure of the democracies to reckon with the necessities of power. In his view, the doctrine of unlimited sovereignty has been the chief begetter of wars, especially when utilized by reactionary interests within the state. He proposes "a greater degree of democracy in our economic structure, a stronger system of administrative control and planning, a clearly envisaged and constitutionally fulfilled democratic centralism, a realistic recognition of the need for a democratic military tradition until the time comes when military functions can be transferred to a world federal state, and finally the welding of a system of economic reconstruction and collective security for the future."

Some rugged truths are voiced by Major Eliot when he insists that law cannot subsist without a foundation of force, and that peace cannot be attained without security. For him the basic problem is, how can democracy retain its free institutions and yet adequately protect itself? Major Eliot favors a limited objective: a post-war order based on Anglo-American collaboration, with great reliance on sea power. It would seem that here the noted military expert might have placed more stress on air power. Professor Viner's proposals are mainly economic in nature. He suggests gradual reduction in tariffs, guaranteed equality of treatment, return to the international gold standard under collective control, some international action to check booms and depressions, and international control of raw material monopolies. Professor Jászi, later on in the book, criticizes these proposals as the "mild dream of the *homo economicus* who still seems to live in spite of the prophecies of Peter Drucker."

Professor Quincy Wright, after a scholarly analysis of the meaning of

justice and of its administration, describes the revolt of the totalitarian states against justice, and proposes the following measures as a means of repressing this revolt: (1) protection of the fundamental rights of man by the world community; (2) abolition of war and neutrality as legal conditions, and treatment of military force as either criminal aggression, necessary self-defense, or international police; (3) subjection of national sovereignty to international procedures for both the settlement of disputes and the enactment of international legislation; (4) organization of security by a distribution of armed power among national, regional and world authorities so as to assure a preponderance of force available against any aggression.

Morals and religion, according to Professor Hocking, offer considerable hope as methods for unifying peoples and nations, and can also provide principles for the regulation of their mutual relations. Finally, Dr. Jász, while treating primarily of the political forms and functions of international organization, presents what amounts to a synthesis of the entire symposium. He advocates a post-war union, but believes it should be confined entirely to democracies upholding the same "way of life," for they alone, he feels, have a "real and efficient will for peace." We cannot create a world state, he says, and we must avoid a simple repetition of the League of Nations. The solution, then, is a Democratic Federal Union, having the power both of maintaining peace at least on its own territory, and of convincing possible aggressors that an attack against its democratic civilization would be hopeless. The League of Nations should be retained, in so far as efficient work can be expected from its structure based upon independent governments. Looser federations should also be encouraged, for instance, Scandinavian, Danubian, Balkan and Baltic. Leadership in this great movement, despite Professor Wooster's doubts, must come from the United States.

JOHN B. WHITTON

Treaties, Engagements and Sanads: A Contribution in Indian Jurisprudence.

By K. R. R. Sastry. Allahabad Law Journal Press, 1942. pp. 315. Index. 15 sh.

More than two-thirds of the total population of the 601 Indian States is contained within the 40 states whose relations with Great Britain are regulated by treaties, engagements and *Sanads*. (A *Sanad*, of which varying definitions have been given, is apparently a solemn instrument under seal.) (pp. 101-102.) The author's analysis of the historical background and contents of those agreements illustrates vividly the complexity of the subtle political relationships which pervade Indian jurisprudence and government. The author examines the nature and status of Indian States in international law, although recognizing that "Problems relating to the position of the Indian States cannot be satisfactorily discussed with reference to purely juristic criteria. In view of the admitted facts, any attempt to evolve a formula must be a failure" (p. 199). As stated in the language

of Sir W. Lee Warner, which is repeatedly quoted by the author, "There is a Paramount Power in the British Crown of which the extent is wisely left undefined. There is a subordination in the Native States which is understood but not explained" (pp. 208, 237, 301). The implications of "paramountcy" are then considered, the author concluding that in treaties prior to 1813 the international independence of the Indian States was recognized, but that thereafter a "shifting from an international to an imperial plane" occurred.

A chapter discussing the rules for interpretation of treaties then precedes one treating certain controversies regarding the interpretation of the treaties, engagements and *Sanads* between the Indian States and Great Britain. In conclusion, the author finds that "an analytical study of the treaties, engagements and *Sanads*—including typical agreements for extradition, Railways, opium, salt, postal conventions, agreements for Indian State Forces, and other miscellaneous arrangements—reinforces the lesson that in an alliance between two States one of which grew much more powerful than the other as to become Paramount, the intrusions of the predominant power *have to be accepted*. Salt agreements, opium conventions, jurisdiction in and extension of Cantonments and residency bazars, closing of mints and coinage, extension of postal system, abolition of transit duties, curtailment of the enfeebled state-forces, the Railway agreements, favourable terms in forest leases, interportal conventions and the Berar Agreements—these have illustrated the price of protection by the Paramount Power" (pp. 309-310).

The author believes that these treaties, engagements and *Sanads* are shackles which should be "allowed to wither away" (p. 312). He advocates the appointment of a Royal Commission immediately after the war to effect a territorial redistribution, reducing the number of States from 600 to 200. He believes that "*a federation is inevitable for a solution of the Indian Political Problem*" (pp. 250-251). He asserts that "the Parliament of Great Britain is legally supreme, and a Statute of Parliament can always cede the exercise of its Paramountcy to the Ministry responsible to an autonomous Indian Federal Legislature. . . . The happiest day of the Crown will be when it will be only *advised by the Federal Ministry of India*, constituted of the two Indias of today" (pp. 254, 312). (Quotations italicized as in the original.)

EDWARD DUMBAULD

A Wavering Friendship: Russia and Austria, 1876-1878. By George Hoover Rupp. Cambridge: Harvard University Press, 1941. pp. xiv, 599. Index. \$5.00.

To its brilliant collection of pieces of historical research the Department of History at Harvard University has now added this elaborately documented study of a critical period in the diplomacy of the major European Powers. The treatment is meticulously detailed, with utilization of much

fresh archival material from Imperial and Soviet Russian sources, as also from the Vienna Archives. To these are added hitherto untouched materials of Hungarian provenience. As a result, the many-sided personalities in the drama are revealed in full and definitive perspective. While the author focuses on the records of official diplomacy, gathered together in orthodox fashion, it is gratifying to note that he is aware of, although he does not fully disclose, the activities of the protagonists of full-fledged independence for the still subjugated nationalities of the Ottoman Empire. One glimpses intermittently in these pages the evidences of the international a-morality of the period; there is incremental testimony and record of the way in which peoples were handed about utterly without reference to their wishes. Only the Russians appear as the exponents of national liberation, the policies of the other Powers being strangely unreceptive to the idea of real independence for the Balkan peoples. One must ultimately attribute to the blindness of prestige diplomacy the failure of statesmen to effect in 1878 a settlement which would have avoided recurring threats to the peace of Europe, such as the Bosnian crisis, and ultimate disasters such as Serajevo. Only after Versailles followed by Munich does the terrible price paid for "peace with honor" at Berlin, after the rejection of a nationality peace like that of San Stefano, become clear.

Dr. Rupp unhappily oscillates between a somewhat uncritical admiration for Bismarck and Andrassy (read Ribbentrop and Bardossy) and an intermittent realization of how they frustrated nationality movements which have since come to fruition. Not since the days of Aehrenthal has any responsible statesman held the view of the author that "to have effected a real and lasting solution of the Balkan problem in conjunction with Russia would have been a piece of real statesmanship" (p. 181). To believe that Austria and Russia could have arrived at "a permanent bargain . . . which would have removed the clash of the two Empires here in the East for all time" (p. 194) appears, in the retrospect of more than three score years, a judgment of an exceptionally naïve character. It is to be hoped that, should Dr. Rupp continue his work in this field, he will find, from an examination of the force and trend of nationality movements, much to correct his perspective. There is still a great deal to be done in authentically documenting, even from musty archives, little-known phases in the process of resurgent nationality.

MALBONE W. GRAHAM

The Disarmament Illusion: The Movement for a Limitation of Armaments to 1907. By Merze Tate. New York: Macmillan Co., 1942. pp. xiv, 398. Index. \$4.00.

Dr. Tate has produced a definitive, scholarly and thoroughly readable study on the disarmament movement down to 1907. The subtitle of the book indicates the general subject matter covered, while the main title stands perhaps as an appraisal of the period. It is another reminder of the

slowness with which mankind moves toward concrete action in the prevention of war and the organization of peace.

The author carries her subject through the Second Hague Peace Conference and has presented the most complete and detailed history which has yet appeared of the trials and tribulations of the pre-World War movement for the limitation of armaments. Most of the books on disarmament which appeared during the last decade, while the subject was at the height of its popularity, dealt with the post-war phases of the question and devoted little or no attention to the pre-war period. The few studies which have attempted to cover the pre-war period were written before 1920 and hence did not have access to all of the pertinent official documents which have since become available, more particularly the British and German. Dr. Tate has made full use of these documents, as well as of the various revealing memoirs and biographies of pre-war statesmen which have appeared since 1920. She has thus been able to give a more complete and correct picture of the official pre-war developments regarding disarmament than any of the earlier writers on the subject.

But she has not confined her discussion to the official side of the picture alone. More than half of the book is devoted to a careful analysis of the activities of the numerous private organizations and individuals in behalf of disarmament from about the middle of the nineteenth century onwards: (a) the Liberal and Left-wing groups; (b) the Universal Peace Congresses and other peace societies; (c) the Inter-Parliamentary Union; (d) the churches; and (e) the international lawyers and jurists. In further chapters, Dr. Tate summarizes and appraises the status and influence of public opinion on the disarmament question. Altogether, she has produced the most thorough and interesting history of the public attitude toward disarmament from 1870 to 1907 that this reviewer has yet seen. She gives ample evidence to show that, despite the efforts of the peace societies and other private groups, public opinion on disarmament had not developed by 1907 to a point where it exerted much influence on government policies.

Disarmament is, of course, primarily a political problem, as Dr. Tate points out, and her study makes it abundantly plain for the pre-1907 period how closely the subject was related to the reconciliation of conflicting national policies and the provision for peaceful change of the *status quo*. A clear parallel can be seen in the critical decade before 1939 when a more grandiose attempt at disarmament also failed in the face of a powerful upsurge of nationalist policies.

ELTON ATWATER

Constitutional Government and Democracy. By Carl J. Friedrich. Boston: Little, Brown & Co., 1941. pp. xx, 695. Index. \$4.00.

The present volume is an extensive revision and enlargement of the author's earlier volume, *Constitutional Government and Politics*. It deals with institutional patterns and the way in which they function. A new

first chapter discusses the rise of constitutionalism, which is viewed as limited government in the interest of the people.

Many subjects, some highly controversial, are passed in review. The stigma is taken off "bureaucracy," which is said to be the core of all government, national or international, and entirely compatible with democracy. The "balance of power" is but an aspect of the distribution of power in national or international politics, and cannot be banished so easily as some have supposed. Modern military techniques, with their aggressive potentialities, "afford the most persuasive argument for supernational government."

Most of the volume has to do with what are commonly regarded as national political institutions, and these are examined with a critical, and sometimes skeptical, eye. "Dictatorship" may be constitutional. Indeed, it may be the final test of constitutionalism, for it is one means of meeting an emergency. Parliamentary government may not be suited to the European continent, owing to the deep cleavages among the peoples. Planning, including especially that in Soviet Russia, is "no magic formula, no open sesame." The executive in government is forging ahead at the expense of representative assemblies, whose function today is less that of initiating legislation than of popular education and the coördination of conflicting interests. Direct popular action cannot give us "real democracy." To suppose that it can is a "utopian dream or a sorry sham." This generalization applies particularly to the idea of a popular plebiscite on the question of war. Mr. Friedrich is obviously afraid that government may get out of hand. Therefore such devices as separation of powers, "mixed" types of government, and judicial review are thought to be desirable safeguards in behalf of constitutionalism.

A final new chapter on scope and method warns political scientists that the methods of the natural sciences are not applicable to political science, which "is largely a critical examination of common-sense notions concerning the working of political institutions and procedures." A critical bibliography adds much value to the volume. The author astonishingly makes the incorrect statement that "no president has ever been elected by a minority" (p. 376). There have, of course, been several such cases. The volume will not be easy reading for the layman, or the beginning student. It is a useful, and at times challenging, study, but we are still waiting for a modern Aristotle to put the data of politics into a new and grand perspective.

G. BERNARD NOBLE

BRIEFER NOTICES

Thomas Jefferson: World Citizen. By Senator Elbert D. Thomas. (New York: Modern Age Books, 1942. pp. viii, 280. \$2.75.) This is a thoughtful and timely book. Of great interest will be found the chapters on religion, education and agriculture, but, in the words of the author, it is essentially "an attempt to interpret Jefferson in terms of world-wide needs and of the

present time world-wide political tendencies." The fact that Senator Thomas is no walled-in philosopher, but a man of world-wide experience, acquainted with the political theories and practices of the Western World as well as with the wisdom of ancient China, and at the same time a practical statesman, fully justifies the attempt. The main thesis of the book rests on the assumption that the world is a unit, and that such was the firm belief of Jefferson, at a time when the close inter-relationship of all the peoples of the world was far less evident than it has become in our days. Although remaining an outstanding "Apostle of Americanism," Jefferson truly was a "citizen of the world," or, if one prefers, of that "universal republic" described by Condorcet and to which belonged "all the good and honest people who knew no enemy but tyranny." This, however, calls for a reservation, or rather an observation, which does not detract anything from the value of Senator Thomas's well-supported contention. That Jefferson realized the cultural unity of the Western World, with which America was so closely connected, cannot be doubted. At the same time, a man who had lived and traveled in Europe could not help feeling that geographically America was cut off from the rest of the world. Jefferson's many isolationist utterances reflect existing conditions, which have since disappeared, and were in clear contradiction with his ideal. The basic principle on which rests Jefferson's theory of government, that "all governments derive their just powers from the consent of the governed," calls for a similar observation. It was in a sense "a revolutionary concept," and, at the same time, as the author points out in a footnote (p. 140), it was also the definition of "a struggle which had been going on throughout the ages." What was new and really revolutionary, was the demonstration that the principle could work in practice, and that a lasting form of government could use it as its main pillar. Before the world could be made safe for democracy, it was necessary to demonstrate that democracy could be made safe for the world, and this is probably Jefferson's outstanding contribution to the cause of democracy throughout the world. No less important remains Jefferson's often repeated motto, as an ideal to be striven for: "one code of morality for men whether acting collectively or singly." At a time when the fate of our civilization is at stake the redefinition and reaffirmation of such principles, "susceptible of universal application" in spite of temporary set-backs, is much needed. The courageous and clear-sighted vision of the author should do much towards helping us to realize at the same time the magnitude of the task before us and the true objectives for which we are fighting.

GILBERT CHINARD

The Soviet Union and the Baltic States. By Kaarel Robert Pusta. (New York: John Felsberg, Inc., 1942. pp. x, 53. Index.) This is a serious, earnest and illuminating pamphlet, authentic in its presentation of the fundamental facts on the side of the Baltic States in their struggle to make clear their case before a disoriented world. Written by a former Minister of Foreign Affairs of the Estonian Republic to refute the claims set forth in the brochure on *The Soviet Union, Finland and the Baltic States* published in London last year on behalf of the Soviet Information Bureau, it brings into clear relief the factually grounded brief of Estonia, Latvia, Lithuania, and, in a limited sense, of Finland and Poland, against the generous calumnies that assailed them in the period just before the Soviet-German war. Replying point by point and in great detail to the accusations of an anonymous Soviet publicist, the author, whose erudition and extensive writings place him among the foremost scholars of our day in dealing with Baltic questions,

takes up the cudgels for his own country and its downtrodden neighbors, to make clear *sub specie aeternitatis* the clear and forthright record of Baltic diplomacy in the score of years between World War I and World War II. Because the greater sins of the Third Reich are so much in the public eye at the moment, and tend to obscure antecedent events, it is certainly worth while to keep clear the record of "the devious processes whereunder the political independence and territorial integrity of the three small Baltic Republics—Estonia, Latvia and Lithuania—were" to employ the mordant words of Mr. Sumner Welles, "deliberately annihilated." Mr. Pusta is deserving of great credit for putting that record, simply and without great ostentation or wild lamentations, before the eyes of the democratic world.

MALBONE W. GRAHAM

Protection of Coastal Fisheries under International Law. By Stefan A. Riesenfeld. (Washington: Carnegie Endowment for International Peace, 1942. pp. xiv, 296. Indices. \$2.00.) This is one of several diverse studies which have grown out of the interest of the Institute of Pacific Relations in the fisheries of Alaska and our Western States. This particular study is concerned with the legal aspects of the problem. What are the seaward limits within which a state may under international law control the exploitation of the coastal fisheries? The author found it was impossible to separate that question from the larger one: What are the seaward limits within which a state may under international law exercise its authority? The study, therefore, is a survey of the evidence from which a rule establishing such limits might be deduced. It does not consider the special problems of bays and straits. It first briefly reviews the situation prior to 1800, and then exhaustively considers the evidence offered by text-writers, by the action of public and private conferences, by state practice, and by decisions of international tribunals in the period since 1800. The tribunals "shed little light on the problem," and the conferences, public and private, were inconclusive. The bulk of the material, therefore, is concerned with the opinions of text-writers and with state practice. The opinions of 227 different authors are abstracted, presented chronologically, and critically evaluated. The legislation and official pronouncements of 41 nations are examined. Full treatment is given the practice of Great Britain and the British Commonwealth of Nations. The author's conclusion from this mass of evidence is that it does not support "the traditional . . . mechanical and unsatisfactory three-mile rule" as a rule of international law governing coastal fisheries. The distinguishing characteristics of this study are its exhaustiveness, its conciseness, and its critical consideration of the evidence. The latter especially deserves commendation. It is a model for anyone who undertakes to examine the evidence from which a rule of customary international law might be deduced.

A. P. DAGGETT

Législation de l'occupation. Recueil des lois, décrets, ordonnances, arrêtés et circulaires des autorités allemandes et françaises, promulgués depuis l'occupation. Tome I (mai-septembre, 1940); Tome II (octobre-décembre, 1940). Paris: Gazette du Palais, 1941. pp. 334, 568. Indices. Frs. 30 and 50.

Les lois de l'occupation en France. By Paul Jacob. New York: École Libre des Hautes Études (New School for Social Research), 1942. pp. 28. European legal documentation, even from unoccupied parts, comes to this country in scarcer and scarcer numbers and more and more incompletely. Consequently a publication of the Paris Law Journal will be of great value by

rendering in chronological order the acts, decrees and ordinances which were published in the Official Journal of the Ordinances of the Military Governor of the Occupied French Territories, in the Official Journal of the French State (formerly of the French Republic), and in the Official Municipal Bulletin of the City of Paris since the occupation (in May, 1940). The quantity alone of the German orders shows that the occupying authorities had prepared beforehand their legal activity. Economic warfare made legislative measures take unsuspected scope: report of property, its requisition and sequestration; administration of corporations; institution of special tribunals; reglementation of communications by mail and transport; payment and clearing agreements with other territories, measures against Jews, etc.

Mr. Jacob undertakes a systematic though concise survey of this legislation, discussing the general measures of police (*verboden*) as well as the economic exploitation of the whole of France. "Never were, in any occupied country, exploitation, looting and economic espionage regulated so scientifically" (p. 15). Moreover, he speaks about the cultural and ideological penetration of French social life through supervision of the book trade, movies and broadcasts.

In principle, the legislative activity of the Vichy Government extends also to the occupied territory, as far as this legislation is not restricted to the unoccupied zone, or is not excluded by special measures of the occupying military authorities. The French Government's "*empirisme organisateur*" (p. 25) is revealed through the fact that there are five different categories of Frenchmen who, though they have kept their nationality, live under a different legal status. The changes in French law as they have occurred since the occupation will be of great importance in problems of international law, public and private. The documentation offers a valuable contribution to any further discussion.

MARTIN DOMKE

Agenda for a Postwar World. By J. B. Condliffe. (New York: W. W. Norton & Co., 1942. pp. 232. Index. \$2.50.) This book deals with the forecast of probable postwar economic developments and suggests principles of national and international action with regard to trade, finance, and international exchange. To this task Professor Condliffe brings an unusual preparation from his years of mobilizing economic data at Geneva. Few are so well qualified to write on these problems. At the end of the present conflict, says the author, a certain amount of national control must be exercised over business to prevent inflation due to scarcity of consumers' goods. After commodity needs are filled, governmental assistance will be required to forestall deflation and unemployment. A progressive elimination of political interference will eventually be necessary, however, to bring about proper price-cost adaptations and to turn production into economically desirable fields. International commodity controls and exchange agreements may be expedient in the transition period. Nationalists may interfere with the reestablishment of satisfactory production and trade by erecting tariffs that will give artificial protection to high-cost industries and by depreciating currency for their own export advantage. To limit such nationalistic action, Professor Condliffe proposes international consultation leading ultimately to supranational institutions, such as an International Tariff Commission and an International Monetary Authority to pass upon changes in tariffs and alterations in agreed exchange rates. Perhaps Professor Condliffe has not sufficiently made allowance for the power of nationalism to prevent the effective operation of international consultative

and governmental institutions. He recognizes this possibility, in fact, but declares that attempts to create a better world order must be made even if the millennium cannot be immediately expected. Particular emphasis is placed upon the responsibility of the United States for the establishment of a sound international economic system. This volume should be read by general students of world affairs and certainly by persons who expect to participate in making the postwar settlements. BENJAMIN H. WILLIAMS

Attempts to Define and Limit "Aggressive" Armament in Diplomacy and Strategy. By Marion William Boggs. Columbia, Mo.: University of Missouri, 1941. pp. 113.

The World Armaments Race, 1919-1939. By N. M. Sloutzki. Geneva: Geneva Research Centre, 1941. pp. 129. 40¢. Professor Boggs's monograph deals with a phase of the disarmament question which has become popular in the last decade: qualitative disarmament. It analyzes primarily the efforts which were made at the Geneva Disarmament Conference of 1932 to distinguish between "aggressive" and "defensive" armaments with a view of limiting the former and thereby attempting to restrict offensive warfare. Attention is concentrated on the Geneva Conference because, despite partial attempts in this direction between 1919 and 1939, it was only here that the principle of limiting "aggressive" armaments was, as Professor Boggs puts it, "accorded the full status of a major premise." No attempt is made to discuss the other (minor) steps taken in the way of qualitative disarmament between 1919 and 1940. The author shows very clearly how the discussions which took place at Geneva reflected the conflicting military policies and strategic positions of the several Powers, and how, because of this, it was never possible for the delegates to reach any unanimous agreement on the distinction between "offensive" and "defensive" armament. The possibilities of a disarmament convention of a qualitative character were therefore almost *nil*. Professor Boggs supplements his analysis of the official discussions at Geneva with a final chapter which examines the writings of leading military theorists and compares their findings on the distinction between "offensive" and "defensive" armaments with the ideas advanced at Geneva.

In his study, M. Sloutzki has presented a very useful analysis of the available statistics on (a) the armaments expenditures of the various countries in recent years, (b) the world trade in arms and ammunition, (c) the permanent armed forces of the world, and (d) the navies of the world. As former editor of two outstanding League of Nations publications, the *Armaments Yearbook* and the *Statistical Yearbook on the Trade in Arms and Ammunition*, the author is exceptionally well qualified to interpret the bewildering statistics in this field. The monograph is the first attempt to summarize and coördinate all the available statistical data on the armament race which preceded the present war.

ELTON ATWATER

Diplomatic Correspondence of the United States: Canadian Relations, 1784-1860. Vol. II. 1821-1835. Edited by William R. Manning. (Washington: Carnegie Endowment for International Peace, 1942. pp. xxxviii, 1016. Index. \$5.00.) This volume is further evidence of the debt that scholars everywhere owe to the Carnegie Endowment for International Peace and to Dr. William R. Manning for the excellence and the completeness of the work done by them or under their direction. This fact is prob-

ably more evident to those of us who live in Canada where publications of this kind are practically non-existent, than it is to those living in the United States or Britain. We hope that in time, however, we too may have similar collections of essentially Canadian materials. The present volume, like the previous one, includes such West Indian materials as are relevant to or form a part of the correspondence dealing with Canada. Among the important topics dealt with are trade and commerce, the northeastern and northwestern boundaries, the North Atlantic fisheries, and navigation on the St. Lawrence. One of the chief tasks of an editor in this field is that of selection and elimination, and Dr. Manning has been both generous and discriminating, for he has retained practically all of the important documents and, in addition, has included many useful comments, references, and other interesting material in his footnotes. While the official correspondence, couched in diplomatic language, is interesting and of the utmost importance, some of the letters, reports and statements of minor officials and private citizens *e.g.*, pp. 148-160 and 715-724, dealing with disputes arising between the settlers along the boundaries of Maine and New Brunswick are fascinating historical documents, for they give the reader a realistic picture of the life and times in which they were written, in a way that no diplomatic document can ever hope to do. Two other volumes in this series are still unpublished. In view of the growing intimacy and importance of the relations of Canada and the United States it is to be hoped that nothing, not even the war itself, will interfere with or prevent their early appearance.

NORMAN MACKENZIE

The Myth of the Total State. By Guenter Reimann. (New York: Wm. Morrow & Co., 1941. pp. 284. \$2.50.) In his introductory critique, Max Lerner thinks Reimann should have called the Nazi régime the Monopoly State instead of the Total State, since he shows its origin in monopoly so well. The distinction between aggressive national monopolies and essentially pacific international monopolies is a leading feature of the book. Its thesis is that the period when Western Europe lived parasitically from world monopolies centering in it is gone. The Nazi outburst is a last effort to retrieve this dominant position by brute force, but it too will fail because the Nazis are repeating in Europe what they did in Germany—creating a military machine so big that it can continue to exist only by blitz conquests. The total monopoly state cannot stop until it becomes a world imperium.

Differing from Burnham's principle that the managerial class is the decisive force, Reimann believes that Hitler maintains his power by balancing three ersatz aristocracies against each other—the army, business and party bureaucracies—and that of these three the weakest and most insecure is the business managerial class. Hitler has largely conquered the army from within by his policy of everything for armament and conquest. Reimann does not join Neumann's *Behemoth* in distinguishing a fourth ruling class, the state bureaucracy, or in Neumann's estimate that the party is gaining at the expense of the others. Reimann anticipates a labor revolution from below, after military defeat, but is not sure that it will be strong enough to take power and avert another attempt of the declassé middle class youth to take over. He is certain that nobody can reconstitute Conservative Man—whom he defines to include the Chamberlain wing of the old aristocracy in all countries, the *rentier* class, comfortable middle class groups and the labor aristocracy—all seeking security and the avoidance of risk, since the mo-

nopolistic position of Western Europe cannot be reconstituted. A long chapter attempting to equate the Nazi and Soviet systems, written before they were at war, has been greatly weakened by subsequent events. The remainder of the book is an important contribution to understanding the forces we must defeat.

D. F. FLEMING

War and Survival. (Berkeley and Los Angeles: University of California Press, 1941. pp. viii, 149. Cloth, \$1.50; paper, \$1.00.) Each of five members of the faculty of the University of California delivered a lecture early in 1941 designed to explore political and military aspects of the war then raging. Professor Loeb (Physics) offers a good classification (pp. 19-20) of naval vessels and concludes that sea power requires aerial support.

Professor Smyth (History) lists Great Britain and France as the principal Mediterranean Powers, with a triumphant Germany as a potential successor. "Periphery" warfare will not defeat Germany; only invasion of the continent can accomplish that end. Japan has not heeded Professor Steiner's (Political Science) assertion that she "lacks the means of waging an additional war against another major power" (p. 89), China being considered a "major power." Japanese intention to rule the world and the influence of Bushido should be more specifically emphasized as basic factors in the Far Eastern situation. The Good Neighbor Policy of the United States is viewed by Professor Priestley (History) as a guide for more general application to combat Nazi penetration and to promote American continental solidarity. After twenty-one pages of historical review, Professor Westergaard (History) joins the reader in concluding that "an analysis of the political and military situation in the Baltic at the present moment involves so much guesswork and prophecy that we may properly leave it to the omniscient news commentators of the press and radio" (p. 120).

WILSON LEON GODSHALL

International Law Documents. Naval War College, 1940. (Washington: Govt. Printing Office, 1942. pp. vi, 257. Index. \$.75.) Contains documents used in the discussions by the Naval War College classes on international law in 1940 in which special attention was given to the conduct of the present war, as well as situations growing out of the neutrality of the United States. The material is reprinted largely from the *Department of State Bulletin*. Other sources are the *Federal Register* and the *New York Times*. Much of it has also been reproduced in the Supplement to this JOURNAL.

Political Handbook of the World, 1942. By Walter H. Mallory. (New York: Harper & Brothers (for the Council on Foreign Relations), 1942. pp. 202. \$2.50.) This annual volume gives detailed information regarding the rulers or leaders of government, parliaments, parties, political programs, and the press of all countries of the world, including the International Labor Organization and the League of Nations. There are seventy-eight titles in this alphabetical arrangement. Political changes in Europe during the present war are noted, such as the listing of the Protectorate of Bohemia-Moravia, the Republic of Slovakia, and the omission of Albania, Estonia, Latvia and Lithuania. Czechoslovakia is listed as a Government-in-Exile in London. The transition of the Government in France following the fall of the Republic in 1940 is shown with the texts of the relevant documents. The information supplied is as of January 1, 1942. Political changes in the

Pacific area following the entry of Japan into the war on December 7, 1941, are consequently not included in the present volume. The continuation of this publication during the war is a most creditable achievement. It will be even more valuable now for reference purposes than during normal times when political changes are less frequent and information concerning them more accessible. G. A. F.

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* Mention here does not preclude a later review.

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